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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 381

R. E. ASHCRAFT AND JOHN WABE, PETITIONERS,

vs.

STATE OF TENNESSEE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

PETITION FOR CERTIORARI FILED AUGUST 28, 1945.

CERTIORARI GRANTED DECEMBER 3, 1945.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 381

E. E. ASHCRAFT AND JOHN WARE, PETITIONERS,

vs.

STATE OF TENNESSEE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

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[fols. 1-39] **IN CRIMINAL COURT OF SHELBY COUNTY**

49904

STATE OF TENNESSEE

vs.

E. E. ASHCRAFT, Alias "Johnnie Ashcraft" & JOHN WARE, Alias "Tom Ware"

Murder in the First Degree & Accessory Before the Fact of Murder in the First Degree

VERDICT—November 28, 1944

Comes the Attorney General on the part of the State and the defendants in proper person and by counsel of record, whereupon there comes into open Court the same jury heretofore selected to try the above cause, which jury having been sworn well and truly to try the issue of traverse herein joined, a true deliverance make and a true verdict render according to the law and evidence, upon their oath do say the defendant Ware Is Guilty of Murder in the First Degree as Charged in the Indictment with Mitigating Circumstances and Fix His Punishment at Life in the State Penitentiary, and that defendant Ashcraft Is Guilty as Accessory Before the Fact to Murder in the First Degree as Charged in the Indictment, with Mitigating Circumstances and Fix His Punishment at Life in the State Penitentiary; thereupon the defendants through their counsels of record, moves the Court for a new trial herein, which hearing is set for December 7, 1944.

[fol. 40] Whereupon the Court adjourned until tomorrow morning at 9:30 o'clock.

John W. Wilson, Judge, Division Two of Circuit Court, Shelby County, Tennessee, sitting by interchange.

[fol. 41] IN CRIMINAL COURT OF SHELBY COUNTY

[Title omitted]

ORDER PERMITTING DEFENDANT JOHN WARE TO FILE AN AMENDED AND SUPPLEMENTAL MOTION FOR A NEW TRIAL—December 4, 1945

This matter came on to be heard before the Court upon a motion and application made by and in behalf of defendant John Ware to be permitted to file an amended and supplemental motion for a new trial in this case.

And it appearing to the Court, upon consideration and hearing, that for good cause shown said motion should be granted;

It is therefore:

Ordered, Adjudged and Decreed by the Court that defendant John Ware be, and he is hereby permitted to file an amended and supplemental motion for a new trial in this case, his original motion having this day been filed [fol. 42] within time and in accordance with the rules of the Court.

It is so ordered.

John W. Wilson, Judge, Division Two of Circuit Court, Shelby County, Tennessee, sitting by interchange.

[fol. 43] IN CRIMINAL COURT OF SHELBY COUNTY

[Title omitted]

ORDER PERMITTING DEFENDANT E. E. ASHCRAFT TO FILE AN AMENDED AND SUPPLEMENTAL MOTION FOR A NEW TRIAL—Filed December 4, 1944

This matter came on to be heard before the Court upon a motion and application made by and in behalf of defendant E. E. Ashcraft to be permitted to file an amended and supplemental motion for a new trial in this case.

And it appearing to the Court, upon consideration and hearing, that for good cause shown said motion should be granted:

It is therefore:

Ordered, Adjudged and Decreed by the Court that defendant E. E. Asheraft, be, and he is hereby permitted to file an amended and supplemental motion for a new trial, in this case, his original motion having been this day filed within time and in accordance with the rules of the Court.

It is so ordered.

John W. Wilson, Judge, Division Two of Circuit Court, Shelby County, Tennessee, sitting by interchange.

[fol. 44] Whereupon Court adjourned until tomorrow morning at 9:30 o'clock.

John W. Wilson, Judge, Division Two of Circuit Court, Shelby County, Tennessee, sitting by interchange.

[fol. 45] In Criminal Court of Shelby County

[Title omitted]

Order Overruling Motions for New Trial, etc.—December 7, 1944

Comes the Attorney General on the part of the State and the defendants in proper person and by counsel of record, whereupon there comes on to be heard defendants E. E. Asheraft's and John Ware's motion for a new trial, which motions having been heard and fully considered by the Court are overruled. Thereupon the defendants made a motion in arrest of judgment, herein, which motions having been heard and fully considered by the Court were overruled, to which action of the Court in overruling their motions for a new trial and motions in arrest of judgment, the defendants excepted. Whereupon the Court proceeds to pass sentence upon the defendants, which is that they be taken by the Sheriff and remanded to jail and at his earliest convenience delivered to the keeper of the State Penitentiary, therein to be confined at hard labor for The Balance of Their Natural Life, and that they pay the cost of this [fols. 46-52] prosecution for which let mittimus and execution issue, to which action of the Court in overruling their motions for a new trial and sentencing, the defendants excepted, and prayed an appeal to the Supreme Court when sitting at Nashville, Tennessee for the Western Division of

the State, which appeal is granted and the defendants are allowed thirty days in which to file their bill of exceptions, and perfect said appeal.

Whereupon Court adjourned until tomorrow morning at 9:30 o'clock.

John W. Wilson, Judge, Division Two Circuit Court, Shelby County, Tennessee, Sitting by Interchange.

[fol. 53] IN CRIMINAL COURT OF SHELBY COUNTY

May Term, A. D. 1941

INDICTMENT

First Count:

The Grand Jurors of the State of Tennessee, duly elected, empaneled, sworn and charged to inquire in and for the body of the County of Shelby, in the State aforesaid, upon their oath, present that E. E. Ashcraft, alias "Johnnie Ashcraft" and John Ware, alias "Tom Ware" late of the County aforesaid, heretofore, to-wit on the 5th day of June, A. D. 1941 before the finding of this indictment, in the County aforesaid, did unlawfully, feloniously, wilfully, deliberately, premeditatedly and of their malice aforethought Kill and Murder Zelma Ida Ashcraft,

Against the peace and dignity of the State of Tennessee.

W. P. Battle, Jr., Attorney-General Criminal Court of Shelby County, Tennessee, Pro-Tem.

[fol. 54] Second Count:

And The Grand Jurors of the State of Tennessee, duly elected, empaneled, sworn and charged to inquire in and for the body of the County of Shelby, in the State aforesaid, upon their oath do further present that E. E. Ashcraft, alias "Johnnie Ashcraft" late of the County aforesaid, heretofore, to-wit on the 5th day of June, A. D. 1941 before the finding of this indictment, in the County aforesaid, did unlawfully, feloniously, wilfully, deliberately, premeditatedly and maliciously move, incite, counsel, hire, command and procure John Ware, alias "Tom Ware" to unlawfully, feloniously, wilfully, deliberately, premeditatedly and maliciously Kill and Murder Zelma Ida Ashcraft; and that in pursuance thereof, the said John Ware, alias "Tom Ware" did unlawfully, feloniously, wilfully, deliberately,

premeditatedly and with malice aforethought Kill and Murder Zelma Ida Asheraft,

Against the peace and dignity of the State of Tennessee.

W. P. Battle, Jr., Attorney-General Criminal Court of Shelby County, Tennessee, Pro-Tem.

[fols. 54a-55] A True Bill: J. Thos. Wellford, Foreman of the Grand Jury.

[Endorsed:] No. 49904, State of Tennessee, Indictment for *Murder in the First Degree and Accessory Before the Fact to Murder in the First Degree* vs. E. E. Asheraft, alias "Johnnie Asheraft" and John Ware, alias "Tom Ware."

Witnesses: Summon for State: Dep. Sher. George A. Becker, c/o Sheriff's Office. By order of W. P. Battle, Jr., Attorney-General, Pro-Tem. Sworn by the Foreman of the Grand Jury to give evidence on this Bill of Indictment, on this, the 20th day of June 1941. J. Thos. Wellford, Foreman of the Grand Jury. George A. Becker, Prosecutor.

[fol. 56] IN THE CRIMINAL COURT OF SHELBY COUNTY

[Title omitted]

MOTION OF THE DEFENDANTS, E. E. ASHCRAFT AND JOHN WARE IN THIS CASE, PRAYING THAT THIS HONORABLE COURT, BY PROPER PROCEDURE, HAVE ENTERED A VERDICT OF NOT GUILTY IN THEIR BEHALF, UPON THE OPINION OF THE SUPREME COURT OF THE UNITED STATES, AND THE OPINION AND PROCEDENDO OF THE SUPREME COURT OF TENNESSEE, AND FURTHER UPON THE ADMISSIONS, REPRESENTATIONS, AND REQUESTS OF THE ATTORNEY GENERAL OF THE STATE OF TENNESSEE AND OF THE ATTORNEY GENERAL FOR THE FIFTEENTH CIRCUIT (SHELBY COUNTY, TENNESSEE) IN BRIEFS FILED AND IN ORAL ARGUMENT IN THE SUPREME COURT OF THE UNITED STATES—Filed November 20, 1944

May it Please the Court:

Comes now the defendants and files this their motion in this Court, embodied in the above caption (not quoted again) and in support of their motion say:

They allege that they were indicted by the Grand Jury

of Shelby County, Tennessee, and charged with the murder of Mrs. E. E. Ashcraft, wife of the defendant, Ashcraft.

They would show to the Court that they have been placed upon trial twice in the Criminal Court of Shelby County, Tennessee, on this charge. They would show to the Court upon the last hearing of their cause, they were convicted by a jury, and sentenced to ninety-nine years in the State penitentiary; that an appeal was taken to the Supreme Court of Tennessee, and the judgment by that Court was affirmed.

[fol. 57] An appeal by certiorari was taken to the Supreme Court of the United States, and the cause reversed as to Ashcraft, and remanded to the Supreme Court of the State of Tennessee as to Ware. The judgment as to defendant, Ware, was vacated by the Supreme Court of the United States and remanded to the Supreme Court of Tennessee for proceedings in accordance with the recommendations of the Prosecuting Attorneys, and not inconsistent with its opinion.

Thereupon, the Supreme Court of Tennessee, in its opinion, reversed the case, both of defendant Ware and of defendant Ashcraft, and remanded the cases to this Honorable Court, not for a new trial, but for "such further proceedings as will not be inconsistent with the judgment and mandate of the Supreme Court of the United States".

The only proceedings that this Honorable Court can take in this case, consistent with the opinion of the Supreme Court of the United States is to, by proper process, order a verdict of not guilty, entered in their behalf.

Any other proceedings or action taken by this Honorable Court would be inconsistent with the opinion of the Supreme Court of the United States, and the mandate of the Supreme Court of Tennessee.

These defendants stood convicted upon their trial, solely and alone, on what purported to be their own confessions. There was no other evidence in the record upon which their conviction could stand, or that even connected them in any way with the commission of the crime.

This case was presented to the Supreme Court of the United States by a representative of the Office of the Attorney General of the State of Tennessee, and the Attorney General of Shelby County, Tennessee for the fifteenth

circuit. The Attorney General of the fifteenth circuit, with the Attorney General of the State of Tennessee, was present representing his circuit of the State of Tennessee at the counsel table of the Supreme Court of the United States, collaborating with the Attorney General of the State of Tennessee in the presentation of this case to that Court.

The direct question was asked the counsel for the State of Tennessee by the Supreme Court of the United States [fol. 58] as to whether or not if the alleged confessions of these defendants were eliminated from the record, there was any evidence left in the record on which a conviction could rest or which connected them in any way with the alleged murder.

It was solemnly admitted in Open Court by counsel representing the State, with the Attorney General of the fifteenth circuit of the State of Tennessee, at the counsel table, that if the confessions were taken out of the record, there was no evidence left on which a conviction could rest.

This, obviously, was the view of the Attorney General of Shelby County, Tennessee on the subject or he would have, from the counsel table of the Supreme Court of the United States, expressed himself otherwise to the Court. It was then time for him to speak or forever hold his peace.

The opinion of the Supreme Court of the United States confirms this statement, and we submit the opinion of the Supreme Court of the United States as a part of this motion.

The opinion of the Supreme Court of the United States in this regard, had the following to say:

> "Upon oral argument before this Court, Tennessee's legal *representatives* conceeded that the convictions could not be sustained, without the confessions, but defended their use upon the ground that they were not compelled, but were freely and voluntarily made".

The Supreme Court of the United States included the Attorney General of Shelby County, Tennessee, as one of the representatives of the State of Tennessee before the Court at the time.

Defendants assume that the Attorney General of Shelby County, will make the same concession at the bar of this Court upon the hearing of this motion.

The Supreme Court of the United States in its opinion handed down May 1, 1944, held in positive and poignant terms, using rather sharp language, that the alleged confession of Defendant, E. E. Ashcraft was illegal and in-[fol. 59] admissible as evidence against him, and struck it from the record. It is submitted that as to the Defendant, Ashcraft, this motion must be, by this Court sustained, because, as aforesaid, any other action taken by this Court other than to give him a verdict of not guilty, would be inconsistent with the opinion of the Supreme Court of the United States.

Under the Declarations in the Opinion of the Supreme Court of the United States, and of the Supreme Court of the State of Tennessee, on Mandate of the Supreme Court of the United States, and the Recommendations of the Attorneys Representing the State of Tennessee at the Hearing of This Case in the Supreme Court of the United States, and in Their Briefs Filed, This Honorable Court Should Grant This Motion in Behalf of Defendant Ware, as Well as Defendant Ashcraft, and Have Entered as to Him, a Verdict of Not Guilty

The State of Tennessee has at all times asked the Courts to acquit Ware if Defendant E. E. Ashcraft be not convicted.

In brief filed in the Supreme Court of the United States, and in oral argument before that Court the legal representatives of the State of Tennessee in positive and no uncertain terms so prayed.

In the brief filed in the Supreme Court of the United States, opposing the grant of the writ of certiorari, counsel for the state of Tennessee say as follows:

> "If upon the whole record this Court shall be of the opinion that Ashcraft was denied due process of law by the introduction of his confession, then the respondent respectfully suggest- that to accomplish complete justice, the judgment should likewise be reversed as against Ware, in order that the greater criminal may not escape, while the lesser pay the penalty."

In a supplemental filed by counsel of the State of Tennesse-, in the Supreme Court of the United States, there is found these words on the subject.

> "Ware was but a pliant tool in the hands of Asheraft, and, left to his own devices, would have never dreamed of committing the homicide for which he stands convicted and the State of Tennessee rebels at the thought of seeing the greater criminal escape while the lesser pays the penalty imposed by law."

[fol. 60] So this Court clearly sees the very positive posision of the State of Tennessee as to Ware, prior to the opinion of the Supreme Court of the United States and the Supreme Court of Tennessee upon its mandate.

The Supreme Court of the United States in its opinion had the following to say as to Ware:

> "Asheraft and Ware were jointly tried, and were convicted on the theory that Asheraft hired Ware to perform the murder. Ware's conviction was sustained by the Tennessee Supreme Court on the assumption that Asheraft's confession was properly admitted and his conviction valid. Whether it would have been sustained had the court reached the conclusion we have reached as to Asheraft we cannot know. Doubt as to what the State court would have done under the changed circumstances brought about by our reversal of its decision as to Asheraft is emphasized by the position of the State's representatives in this Court. They have asked that if we reverse Asheraft's conviction we also reverse Ware's.
>
> In disposing of cases before us it is our responsibility to make such disposition as justice may require. "And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgement was entered." Patterson v. Alabama, 294 U. S. 600, 607; State Tax Commission v. Van Cott, 306 U. W. 511, 515-516. Application of this guiding principle to the case at hand required that we send Ware's case back to the Tennessee Supreme Court. Should that Court in passing on Ware's conviction in the light of our ruling as to Asheraft adopt the State Attorney Gen-

> eral's view and reverse the conviction there then would be no occasion for our passing on the federal question here raised by Ware. Under these circumstances we vacate the judgment of the Tennessee Supreme Court affirming Ware's conviction, and reman- his case to that Court for further proceedings."

The clear implications from that part of the opinion of the Supreme Court of the United States as quoted, is that if the Supreme Court of Tennessee had found Asheraft's confessions invalid and inadmissible as evidence, it would have come to the same conclusion as to the alleged confession of Ware.

The Supreme Court of the United States very graciously remanded the case to the Supreme Court of the State of Tennessee for this action, supported further by the recommendations of the counsel for the State of Tennessee.

The State of Tennessee on the opinion of the Supreme Court of the United States and its mandate, very promptly followed the patent suggestion of the Supreme Court of the United States, and reversed the case of Ware, invalidat- [fol. 61] ing his alleged confession and declaring it inadmissible as evidence against him.

In fact, the Supreme Court of Tennessee in its opinion on the mandate, very properly interpreted the opinion of the Supreme Court of the United State- as holding the alleged confession of Ware to be invalid and inadmissible as evidence against him. The plain language of the opinion of the Supreme Court of Tennessee on the subject so states and holds. It says—

> "Both the defendants Asheraft and Ware were convicted of murder in the first degree on the person of Mrs. Asheraft, wife of the defendant Asheraft. There were certain alleged confessions admitted on the trial of the case. Following the convictions of both defendants, there was an appeal to this court, and the convictions as to both the defendants were affirmed, the Court holding that the alleged confessions were properly admitted. A subsequent review of the convictions by the Supreme Court of the United States resulted in a reversal of the judgment of this Court, that Court holding that the alleged confessions were illegally obtained and were not therefore admissible in evidence."

It is submitted, therefore, on this record as made, this honorable court should grant this motion, and have entered a verdict of not guilty as to Defendant Ware.

Conclusion

Now in conclusion, may it please the Court, we submit that these defendants are entitled to have their case ended. The case has been remanded to this Court where it originated, for entry of any order or to take any action not inconsistent with the opinion of the Supreme Court of the United States. To force them to go through the ordeal of another trial, would be inconsistent with the opinion of the Supreme Court of the United States, and the admissions of the counsel for the great State of Tennessee.

As aforesaid, they have been tried twice, and there has never been presented any evidence to connect these defendants with this crime, aside from their alleged confessions. The case was not remanded to this Court for a new trial at all. They are entitled to have this litigation ended.

They made an effort by proper petition to have our Supreme Court at Nashville dismiss the case on the opinion [fols. 62-63] of the Supreme Court of the United States, proceeding consistent with it.

Instead of taking action, they chose to remand the case to this Court for such action, declaring that "this action on the part of the Court (Supreme Court) would constitute the exercise of original jurisdiction prohibited by the organic law of this State."

We ask this Court now to grant this motion, which is consistent with the opinion of the Supreme Court of the United States, and in accordance with the admissions and recommendations of the counsel for the great State of Tennessee.

Respectfully submitted, James F. Bickers, Attorney for E. E. Asheraft; Grover N. McCormick, Attorney for John Ware.

[fol. 64] IN THE CRIMINAL COURT OF SHELBY COUNTY

[Title omitted]

MOTION OF THE DEFENDANTS HEREIN, EACH OF THEM, INDIVIDUALLY AND COLLECTIVELY, ASKING THE COURT TO, BY PROPER LEGAL PROCEDURE, ENTER A VERDICT OF NOT GUILTY IN THEIR BEHALF, OR DISMISS THEIR CASE—November 20, 1944

Comes now the defendants, individually and collectively, and moves the Court to enter, by proper legal procedure, a verdict of not guilty, as to them, or to dismiss this case, and in support of their motion say:

That they are now being deprived of their liberty and illegally held and incarcerated in violation of their constitutional rights, given to them by the Fourteenth Amendment of the Constitution of the United States.

They aver that their rights in this case have been passed upon by the Supreme Court of the United States in an opinion filed by that Court of May 1, 1944.

It is submitted that this Court held and found that there is no evidence in the record in this case upon which a conviction could rest, and that by a positive mandate of said Supreme Court of the United States, these Defendants are entitled to an acquittal and their liberty restored to them.

They assert that the proceedings now being followed by this honorable Court are wholly inconsistent with the posi- [fols. 65-66] tive mandate of the Supreme Court of the United States in its opinion, and is depriving them, as aforesaid, of their rights under the Fourteenth Amendment of the Constitution of the United States, which says that no State shall deprive any person of life, liberty or property without due process of law; nor deny to any persons within its jurisdiction, the equal protection of the laws.

It is therefore asked that this motion be sustained by the Court; the positive mandate of the Supreme Court of the United States carried out; and constitutional rights under the Constitution of the United States preserved to them, and their liberties restored to them.

James F. Bickers, Grover N. McCormick, Attorneys for Defendants.

[fols. 67-68] IN THE CRIMINAL COURT OF SHELBY COUNTY

[Title omitted]

MOTION OF THE DEFENDANTS IN THIS CASE, FILED IN THEIR BEHALF, INDIVIDUALLY AND COLLECTIVELY, TO HAVE THIS CASE, BY THE COURT, DISMISSED AND THEIR LIBERTIES RESTORED TO THEM—November 20, 1944

Come now the defendants in this case, and move this Court, individually and collectively, to by proper procedure, dismiss this case and restore their liberty to them, and in support of their motion say:

That their case has already been tried and that they have been placed once in jeopardy, and that by a positive mandate of the Supreme Court of the United States, they are entitled to their liberties, it being so declared in said opinion; that no evidence exists in the record or found therein upon which a conviction could rest, and that to put them to trial, would be to twice put them in jeopardy against their constitutional and statutory rights, under the Constitution of both the State of Tennessee, and the United States.

They therefore ask that this motion be sustained, and their liberties restored to them by proper legal procedure.

James F. Bickers, Grover N. McCormick, Attorneys for Defendants.

[fol. 69] IN THE CRIMINAL COURT OF SHELBY COUNTY

[Title omitted]

MOTION FOR SEVERANCE—November 20, 1944

Comes now the defendant, E. E. Ashcraft, and moves the court for a severance of his trial from that of his co-defendant, John Ware, on the grounds that the defenses are antagonistic.

He further states in this his motion, that the Supreme Court of the United States, held in his case, that inquiries among his neighbors, business associates, and friends likewise, failed to unearth one single tangible clue, pointing to his guilt, and that they, in our opinion, vacated the judgment as to John Ware.

It holds positively and irrevocably that there was no evidence against E. E. Ashcraft.

It would be manifestly an unjustness to try E. E. Ashcraft with the defendant, John Ware.

James F. Bickers, Attorney for E. E. Ashcraft.

[fol. 70] In Criminal Court of Shelby County

(The motions having been fully argued the Court rendered the following opinion):

The Court: Where are the motions that have been filed?

(Clerk hands court papers.)

The Court: Gentlemen, of course it will first be necessary that I rule on the motion that has been made orally for me to recuse myself. In order that the record may be entirely clear about that, I have taken the trouble of preparing a written memorandum on that matter which at this time I will read. I will file this with the clerk.

In the Matter of E. E. Ashcraft and Tom Ware, Alias John Ware

Memorandum on Motion to Recuse—November 20, 1944

An oral motion has been made by counsel for the defendants for the Court to recuse itself. The motion as made by J. F. Bickers, Attorney for the defendant E. E. Ashcraft, was stated in the following words:

> "I make the motion that your Honor recuse himself in this case for the reason that your Honor signed a Bill of Exceptions that was not a Bill of Exceptions."

No further comment or argument was made by the said J. F. Bickers.

Grover McCormick, Attorney for defendant Ware, thereupon stated to the Court he desired to join in the motion of J. F. Bickers. Grover McCormick made no further comment or argument on the motion to recuse.

Several days ago when Judge Kinkle called on me in my office and stated to me that he would sustain the motion that had been filed for him to recuse himself and requested that I

[fol. 71] sit by interchange with him for the trial of the said E. E. Ashcraft and Tom Ware, alias John Ware. I stated to him that if it were only a question of personal choice I would say "no", but since the question of judicial courtesy as well as the mandates of our statutes with reference to Court's setting by interchange was concerned, I would have to say "yes", knowing of no good reason why I could not try the case.

I assume that counsel for the defendants in making the motion above stated, refer to an occurrence shortly after the first trial of the defendants. The late Judge Phillip Wallace presided at the first trial and after the trial was stricken with pneumonia, from which illness he later died. When Judge Wallace was unable to hold Court on account of his illness, I was elected to set for him by the members of the Bar, being at that time a practicing Attorney of the Memphis Bar. Judge Wallace, while I was setting for him, was so ill that his physicians would permit no one to see him. In this situation, it was that the attorney for the defendants filed with the Clerk of the Court a "Bill of Exceptions" which did not bear the signature of the trial Judge. Everyone was confused as to the situation existing and it was then that I signed the Bill of Exceptions, specifying in what capacity and instructing the Clerk to send the matter to the Supreme Court on the appeal which had been prayed by the defendants in order that the situation might be clerified by that Court.

[fol. 72] I know of no reason at all why I cannot fairly and impartially preside over the trial. I know nothing of the facts, and all I am interested in is seeing that the defendants have a fair and impartial trial. To grant the motion, I could not escape the feeling in my own conscience that I was restoring to subterfuge in order to escap- presiding over a trial which by personal preference I would rather not.

The motion is, therefore, denied.

John W. Wilson, Judge by Interchange.

This the 20th day of November, 1944.

Filed November 20, 1944. Fred L. Christenbury, Clerk, by Fred L. Christenbury.

The Court: I was advised by Judge Kinkle that the attorneys for the defendant suggested that I try this lawsuit.

Mr. McCormick: He is in error about that.

Mr. Bickers: Absolutely in error, I suggested Judge Hamner.

The Court: Either me or Judge Hamner.

Mr. McCormick: Your Honor is filing that memorandum you have read with the clerk? It is filed for record?

The Court: Yes, sir. Would you like to except to that?

Mr. McCormick: Yes, sir.

Mr. Bickers: Yes, sir.

ORDER DENYING MOTION FOR VERDICT OF NOT GUILTY

The Court: The first motion we have is the motion filed by both defendan-s asking that a verdict of not guilty be entered for the defendants. Of course, as all you lawyers know, the case of the defendant Ashcraft was reversed by the Supreme Court of the United States and the Judgment of the Supreme Court of Tennessee as to the defendant Ware was vacated by the Supreme Court of the United [fol. 73] States and both cases sent back to the State Court for further consideration. Now it is obvious that the Supreme Court's opinion was not a reversal on the facts of the case. It was strictly a reversal because of the admission of erroneous evidence, the trial Court having admitted the confession of the defendant Ashcraft. The United States Supreme Court did not pass on the question of the defendant Ware's confession. The same motion now made before this Court was made before the State Supreme Court after the case was sent back to that Court, and in the procedento that has been sent down by the Supreme Court to this Court, we note the following language:

"After all, the sufficiency of the evidence against the defendant Ashcraft, with his confession elided, as required by the judgment of the Supreme Court of the United States, is a question which should be passed upon in the first instance by a trial Jury."

Now the language contained in that precedento, gentlemen, is unambiguous. It is very plain, and, as I view it, if this motion were sustained, I would be setting myself up as a superior court.

The case was rever-ed in the first instance by the United States Supreme Court strictly on a question of law in the admission of evidence.

The motion will have to be denied.

Mr. McCormick: Note my exception.
Mr. Bickers: Note my exception.

[fol. 74] ORDER OVERRULING MOTION FOR VERDICT OF NOT GUILTY OR FOR DISMISSAL

The Court: There has also been filed a motion by counsel styled "Motion of the defendants herein, each of them, individually and collectively, asking the Court, by proper legal procedure, enter a verdict of not guilty in their behalf, or dismiss their case". That motion sounds somewhat like the other motion. However, different questions are raised in this motion. I am of opinion that that motion should be overruled.

Mr. Bickers: Exception.
Mr. McCormick: Note my exception.

ORDER OVERRULING MOTION TO DISMISS

The Court: There is still another motion styled "Motion of the defendants in this case, filed in their behalf, individually and collectively, to have their case by the Court dismissed and their liberties restored to them." The Court is of opinion that that motion is without merit and will be overruled.

Mr. Bickers: Exception.
Mr. McCormick: Exception.

ORDER OVERRULING MOTION FOR SEVERANCE

The Court: And there is the motion for a severance filed by Mr. Bickers for the defendant Asheraft. That will also be overruled.

MOTION CHALLANGING ENTIRE PANEL

Mr. Bickers: I except and make this further motion: for the defendant Asheraft I challenge the entire panel for the reason that Judge Kinkle, who recused himself, qualified the veniremen this morning and from that venire will be chosen jurors to try this man and I submit the panel should be challenged.

The Court: Any reply, General;

General Gerber: I can only say this: all that the judge [fol. 75] does is to qualify them to sit as jurors and these

jurors, after they are qualified by him, are sent to the big jury room where all of the Judges of the four circuit courts and the criminal courts can draw on the panel for their respective courts.

The Court: Of course, Mr. Bickers, Judge Kinkle wasn't qualifying jurors only for the actual trial of this lawsuit. He was also qualifying them for Divisions 1, 2, 3 and 4 of the Circuit Court. That motion will be overruled.

Mr. Bickers: Note my exception.

The Court: Are you ready to proceed?

General Gerber: We are.

The Court: Bring in the jurors.

(General Gerber thereupon stated the contentions of the State, whereupon the qualifications of jurors began.)

[fol. 76] IN THE CRIMINAL COURT OF SHELBY COUNTY, TENNESSEE, DIVISION ONE

STATE OF TENNESSEE

vs.

E. E. ASHCRAFT, and JOHN WARE (c), Defendants

Bill of Exceptions—Filed January 13, 1945

Be it Remembered: This cause came on to be heard on this the 25th day of November, 1944, in the above styled Court, before Hon. John W. Wilson, Judge of Division II of the Circuit Court of Shelby County, Tennessee sitting by interchange for Hon. R. G. Kinkle, Judge of Division I of the Circuit Court of Shelby County, Tennessee, and a jury selected by counsel for the State and the Defendants.

APPEARANCES:

Representing the State, Atty. Gen. William Gerber, Asst. Atty. Gen. Charles A. Rond.

Representing the Defendants: Mr. James F. Bickers, for Defendant E. E. Ashcraft; Mr. Grover N. McCormick, for Defendant John Ware.

PLEAS OF NOT GUILTY

After the selection of a jury acceptable to counsel for both the State and the Defendants, the Assistant Attorney

General read the Indictment to the jury, to which counsel for both Defendants entered pleas of Not Guilty.

Thereupon, in support of the charges contained in the Indictment, the States presented the following Testimony:

[fol. 77] E. R. HALL, the first witness for the State, being duly sworn, testified as follows:

Direct examination.

By Gen. Gerber:

Q. State your name to the Court and jury?
A. E. R. Hall.
Q. And you are engaged in what business?
A. Retail drug business.
Q. Where is your business Mr. Hall?
A. Located at the corner of Macon Road at National.
Q. How long have you been in business at that establishment?
A. Twenty years, the last of August.
Q. I will ask you whether or not you knew a woman by the name of Zelma I. Ashcraft?
A. I did.
Q. Do you remember where she lived?
A. Yes, I do.
Q. Where did she live?
A. On Stanton Road.
Q. How far did she live from your drug store?
A. Approximately one mile north.
Q. I will ask you if she came to your drugstore from time to time?
A. She did; frequently.
Q. I will ask you if you had occasion to see her on the [fol. 78] night of June 4, 1941?
A. I did.
Q. About what time that night did you see her?
A. Between 9 and 9:30.
Q. Did she come with anyone at the time?
A. A young lady.
Q. Did she make a purchase?
A. Yes, she did.
Q. What did she purchase at that time?
A. Some amytol tablets.

Q. I will ask you—I want to show you a box here and ask you if that is the box in which you placed the amytol tablets sold by you that night?

A. That is the box.

Q. How many did you sell her at that time?

A. A dozen.

Q. How many are in the box now?

A. Seven.

Q. You don't know what became of the others?

A. I do not.

Gen. Gerber: I want to introduce this box in evidence and mark it Exhibit "A" to the testimony of Mr. Hall. Let it be marked.

(The box so introduced was marked Exhibit "A" to the testimony of the witness Hall.)

Q. Please tell the jury what amatol tablets are?

[fol. 79] A. It is a sedative preparation used to quiet the nerves in small doses. In larger doses it is an hypnotic drug producing sleep.

Q. Have you had occasion to take amatol tablets?

A. I have on occasions, on the doctor's orders.

Q. How much would you take,—one at a time?

A. One tablet. Those are grain and a half tablets, the usual dose.

Q. How long will you sleep when you take one?

A. Approximately 8½ hours.

Q. State whether you had occasion during the time you have known Mrs. Zelma Ashcraft, to sell her much medicine or preparations?

A. Quite a few prescriptions.

Q. What was it usually for?

A. Usually a sedative or a hypnotic or something for her nerves.

Q. Something for her nerves?

A. Yes, sir.

Q. State whether or not you knew she was a nervous woman or not?

A. From outside appearances, she appeared to be a nervous woman.

Q. I want to show you a photograph here and ask you who that is?

A. That is a picture of the late Mrs. Ashcraft.

Mr. Gerber: I want to introduce that photograph and [fol. 80] mark it Exhibit "B" to the testimony of Mr. Hall.

Q. At the time she was in your drugstore on the night of June 4th, she was alive at that time?

A. Yes, sir.

Gen. Gerber: Take the witness.

Cross-examination.

By Mr. Bickers:

Q. Mr. Hall, I understand you had been selling the preparation there previous to that; is that true?

A. I don't recall selling her amatol previous to that night.

Q. As I understand, some of the preparations she bought from your place, had a narcotic in it?

A. Some prescriptions had a narcotic.

Q. They were signed by a doctor?

A. That is right.

Q. You did fill some.

A. Yes, sir.

Q. Ever sell one at her request, over the telephone?

A. Telephoned prescription?

Q. Yes?

A. I believe so.

Q. That was like the others, contained a sedative or narcotic?

A. Not a narcotic over the telephone—have to have a prescription. A sedative or something like that, I can take a prescription over the telephone.

[fol. 81] Q. She just came in that night and ordered amatol tablets and you sold it. There was nothing unusual about it?

A. No, sir.

Q. She was no more nervous than she had been the other times in your place of business?

A. I don't think so.

Mr. Bickers: That is all.

Mr. McCormick: No questions.

(Witness excused.)

GILES MATTEER, the next witness in behalf of the State, being first duly sworn, testified as follows:

Direct examination.

By Gen. Gerber:

Q. State your name to the Court and Jury?
A. Giles Matteer.
Q. You have lived in Memphis for how long?
A. All my life.
Q. Mr. Matteer, I will ask you on June 5th, 1941, where you were employed on that day?
A. Here in the Sheriff's office.
Q. As a Deputy Sheriff?
A. Yes, sir.
Q. What were your duties, in so far as work on June 5th, 1941 as a Deputy Sheriff in the Sheriff's office?
[fol. 82] A. I was a Deputy in the Squad Car.
Q. So the gentlemen on the jury may know, what, in particular was the duty of the Squad Car?
A. They patrolled the county.
Q. I will ask you if at any time on that day, June 5th, 1941, you received a call to go anywhere in the vicinity of Raleigh?
A. Yes, sir.
Q. What time was that Mr. Matteer?
A. About 4:30 p. m.
Q. Where were you at the time you received the call?
A. Near Woodstock on the Woodstock Road.
Q. When you received the call at about 4:30 on that day, where did you go?
A. We came to the second bridge south of Raleigh on the Raleigh Road.
Q. When you got to the second bridge south of Raleigh, tell the jury whether you saw anything parked in the vicinity and where it was parked?
A. Yes, sir; found a 1939 blue Dodge automobile parked on the west side of the right-of-way headed towards Raleigh, on the wrong side of the road.
Q. When you say you found a blue Dodge parked on the wrong side of the road, headed towards Raleigh, you mean the car was headed north?
[fol. 83] A. Headed north, yes, sir.

Q. On the wrong side of the road, or west side at that place?

A. Yes, sir.

Q. I want to show a photograph here and ask you to tell us Mr. Matteer, whether that shows the condition as it existed out there on June 5th, 1941, on the Raleigh Road?

A. Yes, sir.

Q. I will ask you whether the photograph shows the second bridge?

A. Yes, sir.

Q. You say the automobile was found near the second bridge south of Raleigh?

A. South of the second bridge.

Q. The second bridge you speak of being the second bridge in the picture?

A. Yes, sir.

Q. Raleigh is north?

A. Yes, sir.

Q. I want you to indicate on the photograph where the car was marked, this Dodge car at that time?

A. (Witness indicates on the photograph, marking same.)

Q. Mr. Matteer, I want to ask you whether there is a road that leads off the Raleigh Road that goes down towards any body of water at that location?

A. Yes, sir.

[fol. 84] Q. How far from that intersection of that road that led to the slough or body of water, was the car parked?

A. Right at the intersection, I imagine about 3 or 4 feet north of the intersection, put the back door about even with the intersection which leads down to the slough.

Q. And that was the condition that existed at that time?

A. Yes, sir.

Gen. Gerber: I want to introduce that photograph and mark it Exhibit "A" to Mr. Matteer's testimony.

(Photograph so introduced was so marked.)

Gen. Gerber: I want to pass this photograph to the jury.

(Inspection by the jury.)

Q. Now Mr. Matteer, I notice on the photograph, there is a little place that looks like what might be a road running off that road there.

A. Yes, sir.

Q. I want to show you a photograph—some photographs,—and ask you what these photographs show?

A. This is a picture of the automobile found on the Raleigh Road.

Q. Is that the front end of it?

A. Yes, sir.

Q. And what is that?

A. The back end. This is the side view and this is the other side.

[fol. 85] Gen. Gerber: I want to introduce those marking them Exhibits "B," "C," "D" and "E" to Mr. Matteer's testimony.

(Photographs so marked as indicated.)

The Court: Do you wish to examine these photographs, Gentlemen of the Jury?

(Inspection of photographs by the jury.)

Q. Mr. Matteer, what was the condition of this car at the time you got to it that evening?

A. When we got there we found the left front door open and we found various little articles there on the ground.

Q. What did you find at that time?

A. We found a finger nail file, a black turban and a driver's license.

Q. I want at this time to show you a finger nail file and ask you if this is the file or one similar to it, you found on the ground on the left hand side where the door was open at that time?

A. Yes, sir.

Gen. Gerber: I want to introduce the file in evidence and mark it an Exhibit to the testimony of Mr. Matter,—Exhibit "F."

(So marked as Exhibit "F," testimony of Matteer.)

Q. You say the articles were found on the ground on the left hand side where the door was open?

A. Yes, sir.

Q. I want to show you a driver's license and ask you if [fol. 86] that is the driver's license found there at that time on the ground?

A. Yes, sir.

Q. Who was the license issued to?
A. Zelma Ida Ashcraft, 3520 Stanton Road.

Gen. Gerber: I want to introduce that in evidence, and mark it Exhibit "G" to the testimony of Mr. Matteer.

Q. Now you stated you found the turban at that time on the ground?
A. Yes, sir.
Q. I show you a turban and ask you if that is the garment you found there at that time?
A. Yes, sir; that is the one.

Gen. Gerber: I want to introduce that and mark it Exhibit "H" to the testimony of Mr. Matteer.

Q. Mr. Matteer, you testified that on the left hand side of the car you found a finger nail file, the driver's license and the turban?
A. Yes, sir.
Q. Now did you find anything on the inside of the car?
A. Yes, sir; found on the inside of the car on the front seat right hand side of the automobile a pocket book, open and empty. Next to that we found a towel underneath the steering wheel. On the front seat was a foot print right up underneath the driver's seat.

[fol. 87] Gen. Gerber:

Q. I want to show you a pocket book and ask you if that is the pocket book you found out there on the right hand front seat of that car?
A. Yes, sir.

Gen. Gerber: I want to introduce that and mark it exhibit "I" to the testimony of Mr. Matteer.

(So marked as Exhibit testimony of Matteer.)

Q. I now hand you a towel and ask you if this is the towel you found on the right seat of that car?
A. Yes, sir.

Gen. Gerber: I want to introduce that and mark it as Exhibit "J" to the testimony of Mr. Matteer.

(So marked as Exhibit "J" to testimony of Matteer.)

Q. Mr. Matteer, I want to show you an automobile seat and ask you to state whether or not that was the front

seat of the Dodge automobile found on the Raleigh Road on which you state there was a foot print on that seat under the steering wheel?

A. Yes, sir.

Q. Do you see the print now?

A. Yes, sir.

Q. I will ask you if you know after the investigation, after the seat was brought in here, there was any chemical means used to preserve it?

A. I don't know.

[fol. 88] Gen. Gerber: I want to introduce that as Exhibit "K" to the testimony of the witness.

(So marked as Exhibit "K," testimony of Matteer.)

Q. You say that the print was under the sterring wheel of that car?

A. Yes, sir; left hand side.

Mr. Gerber: Right at this time, for the benefit of the jury, I want to pass the driver's license to them so they can see it.

(Examination of driver's License by the jury.)

Juror: Does that pocketbook have a mirror in it?

Q. Mr. Matteer,—gentlemen, some of the Exhibits, like the pocket book, the towel, etc.,—all you have got to do is to ask for them if you want to see them.

(The pocket book is here passed to the jury.)

Q. Mr. Matteer, what, if anything, did you find in the back of the car?

A. We found a suit case right behind the driver's seat on the floor and then we found a paper bag with a black hat in it on the back seat of the car,—in the right hand side on the floor we found a blanket.

Q. I hand you a suit case and ask you whether or not that is the suit case you found behind the driver's seat at that particular time?

A. Yes, sir.

Gen. Gerber: We introduce that and ask it be marked as Exhibit "L" to the testimony of the witness.

(So marked Exhibit "L" testimony of Matteer.)

[fol. 89] Q. I want to show you a sack here with a hat in it and ask you if that is the sack with the hat which you found there at that time?

A. Yes, sir.

Q. I want to ask you whether the sack was in good shape at the time you found it January 5th, 1941?

A. The sack is torn now, but was not then.

Q. But you found a black hat in the sack that is in it now,—in this sack?

A. Yes, sir.

Q. Behind the driver's side?

A. No, sir; behind the right side on the back seat.

Gen. Gerber: I want to introduce that and have it marked Exhibit "M" to the testimony of Mr. Matteer.

(So marked and introduced as Exhibit "M," testimony of Mateer.)

Q. I show you a blanket and ask you what it is?

A. The blanket found in the auto on the Raleigh Road.

Q. Where was it?

A. At the time on the floor on the right hand side of the automobile in the back.

Gen. Gerber: I want to introduce that as Exhibit "N" to the testimony of Mr. Matteer.

Q. Mr. Matteer, what was the condition of the automobile with reference to the lights being on or off?

Q. The lights were off, the ignition was on.

Q. I will ask you whether you had an opportunity to see [fol. 90] whether there was any blood inside of the car?

A. Yes, sir.

Q. Did you find any?

A. No, sir.

Q. Did you have an opportunity to look in the immediate vicinity of where the car was parked and find any blood?

A. We did, but did not find any blood.

Q. Did you—were you able at that time to make a thorough investigation of what was around this car?

A. About that time someone hollered from down at the slough, to come down there,—that there was an object in the water.

Q. Did you leave the car and go to the slough then?

A. Yes, sir.

Q. I want to show you a photograph and I will ask you to state to the Jury what that photograph shows?

A. It shows the body of water where we found Mrs. Asheraft.

Q. Does it show the road leaving the Raleigh Road, to the body of water?

A. Yes, sir.

Q. It leads down here to this body of water?

A. Yes, sir.

Gen. Gerber: We introduce that photograph and ask it be marked as Exhibit "O" to the testimony of Mr. Matteer.

(Exhibit so marked "O" to testimony of Matteer.)

The photograph shows the road leading off the Raleigh [fol. 91] Road to the body of water.

Q. Mr. Matteer, I will ask you whether you went down to the slough at the time you heard somebody holler down there?

A. Yes, sir.

Q. When you got there did you meet anybody?

A. Yes, sir. Met a man named Mr. Cates down there in a boat. I got in the boat with him and we paddled out to the body floating on the water and took hold of the back of her dress and paddled back to the shore—to the bank.

Q. Was the body you found the body of a man or a woman?

A. A woman.

Q. Did you note anything on the back or front?

A. It was face down in the water.

Q. I want to show you Mr. Matteer another view of this body of water and ask you how—to show the jury by marking, about where in the slough of water—where you found the body floating?

A. (Indicating on the photograph.)

Q. You have indicated about where the body was found floating in the water, is that right?

A. Yes, sir.

Gen. Gerber: I want to introduce that photograph as Exhibit "P" to the testimony of Mr. Matteer.

(Photograph so marked Ex. "P" and inspection by the jury.)

Q. Now Mr. Matteer, after you got down to the slough —down to this body of water, you say there was a man [fol. 92] there with a boat and you got into the boat and he paddled you out there and you found this body floating on its face?

A. That is right.

Q. What was done with the body at that time?

A. I got hold of it at the back of the dress and we paddled back to the bank and placed a rock under her head and there were several people there.

Q. Now after you first saw the body did you see anything in her hair?

A. Yes, sir; she had a pair of glasses on the back of her head.

Q. I want to show you this pair of glasses and ask you if these are the glasses you found at that time?

A. Yes, sir.

Q. State whether or not they still contain some hair?

A. Yes, sir.

Gen. Gerber: If your Honor please, we want to introduce these glasses in evidence and mark them Exhibit "Q" to the testimony of Mr. Matteer.

(So marked Ex. "Q" to testimony of Matteer.) (Inspection by the jury.)

Q. Mr. Matteer, you say the body was taken out of the body of water and up on the bank and her head placed on a rock?

A. Yes, sir.

Q. At that particular time, state to the jury whether the body you found had any garments on it?

[fol. 93] A. Yes, sir; she was fully clothed.

Q. She was fully clothed?

A. Yes, sir.

Q. I want to show you Mr. Matteer, a dress, and ask you what that is?

A. That is the dress Mrs. Asheraft had on.

Q. I note some buttons on the front of the dress. State whether or not it was buttoned or unbuttoned at that time?

A. It was buttoned.

Q. Was there anything else on the garment that attracted your attention at that time?

A. A large gold plated pin up above that top button.

Q. I show you a pin and ask you whether that is the pin you saw there at that time?

A. Yes, sir.

Q. You say, up above the top button?

A. Yes, sir.

Q. It was pinned at that time?

A. Yes, sir.

Q. Mr. Matteer, at that particular time I will ask you to state to the Court and jury whether you found any blood on that dress?

A. No, sir.

The Court: I note some of the jury is trying to see the Exhibit. You might move it out further so they can see it [fol. 94] if they so desire.

Gen. Gerber: Pardon me gentlemen.

Q. You say at that particular time you found no blood in that dress?

A. No, sir.

Q. Did you at that particular time examine that body to determine what caused the death,—whether struck or not with some instrument?

A. No, sir; I didn't examine her. I could see a hole in the top of her head when approaching the body in the boat, and also after we put it on the bank.

Q. Holes in the top of the head?

A. Yes, sir; you could see those.

Q. Mr. Matteer, at that particular time, after you removed the body from the slough and placed it on the bank, as you have testified to the jury, did you make any investigation in the immediate vicinity of where the body was found, along the bank, to see whether you could find any blood of any kind?

A. Yes, sir.

Q. Did you find any blood?

A. No, sir.

Q. Did you find any sign of a struggle?

A. No, sir; I did not.

Q. While you were there, after the body had been removed [fol. 95] from the water and was lying on the bank, did any other officers from the Sheriff's office arrive on the scene?

A. The undertaker people first came along in an ambulance, and about that time Mr. Becker and Mr. Key came out.

Q. Who are they?

A. Connected with the Homicide Squad here.

Q. In the Sheriff's Office?

A. Yes, sir.

Q. When they got there, did you do anything further at the scene of the crime?

A. No, sir.

Q. Did you go anywhere at that time?

A. Yes, sir; we left there after Mr. Becker got down there and parted Mrs. Asheraft's hair and looked at the top of her head, then we left there and went to 3520 Stanton Road.

Q. Who went to 3520 Stanton Road at that time?

A. Jimmy Davis, a partner of mine in the Squad Car.

Q. You went to 3520 Stanton Road. State to the jury why you were going there?

A. To talk to someone in regard to this body found down there in the slough of water.

Q. How did you happen to go *the* 3520 Stantion Road?

A. By the Driver's License.

Q. When you got to 3520 Stanton Road, about what time would you say it was, approximately?

[fol. 96] A. Well, I don't know exactly what time it was.

Q. You paid no attention to the time?

A. No, sir. Received the call at 4:30; I don't know; about an hour, I guess.

Q. When you got to 3520, was there anyone home?

A. Could not get anyone to the door.

Q. What did you do then?

A. Walked across the street and talked to a lady and found out later the lady was a Mrs. Gambreal,—and while talking to her, she pointed up the street and said: there is Mr. Asheraft now coming down the road. And I walked up to him and made myself acquainted with him and told him I had sad news for him; that we found his wife in a slough of water and it looked like she had been murdered; and Mr. Asheraft said; not my wife; she left here early this morning.

Q. After that talk at that particular time, where did you go?

A. Over to Mr. Asheraft's home, and when we got there Mr. Becker and Mr. Key were there and I made Mr. Asheraft acquainted with them, and we then went into the living room, and Mr. Asheraft sat down on the divan, and Mr. Becker, Mr. Key, Mr. Davis and myself, were in the room.

Q. Were there any other people there at that time?

A. No, sir.

Q. The undertaker came there then?

A. I don't know; I don't recall.

[fol. 97] Q. What happened at that time?

A. Mr. Asheraft was sitting on the divan and Mr. Becker asked what time his wife left, and Mr. Asheraft said she left about 3:30 this morning. Then right away Mr. Asheraft asked, had she been robbed, and wanted to know if we found her bank books, and Mr. Becker asked if she had anything on her; and Mr. Asheraft said yes, she had a chamois home-made pouch pinned to her undergarment, and which contained about $200.00 in money and a pocket book with $50.00 in it and a diamond ring. And then they asked about the maid that worked there, and Mr. Asheraft—he said, I don't know where she lives, the number, but he could take us and show where she lived.

Q. State to the jury whether at the time you made known to Mr. Asheraft that his wife had been found murdered in this slough of water, whether he showed any emotion of any kind?

A. No sir, he was calm about it.

Q. I will ask you if at that particular time when you told him of finding his wife in the slough of water, at the time Mr. Becker had the conversation with him, whether he asked you, Mr. Becker or anybody in the room, the location where his wife was found?

A. No, sir.

Q. I will ask you whether, at that particular time, he asked either of you gentlemen to take him to the place where his wife's body was found?

A. No, sir.

[fol. 98] Q. I will ask you to state to the jury at that particular time, if he asked where his wife's body was?

A. No, sir; we had already told him it was found in a slough of water.

Q. Then did he ask you where the body of water was?

A. No, sir.

Q. After you had the conversation at the house and about the maid, did you go anywhere to search for the maid?

A. Yes, sir. Mr. Asheraft got in the car with Mr. Davis and myself and directed us over to where the maid lived.

Q. Did you find her at that time?

A. No, sir. Not at home.

Q. Was any word left there?

A. Word was left by the other car, not by us, to report to or get in touch with the Sheriff's office. After we left Mr. Asheraft's house we found where the maid lived and left word for her to report to the Sheriff's office.

Q. Where did you go then?

A. To Collins Funeral Home, Mr. Asheraft, Mr. Davis and myself.

Q. Who else was there in the Collins Funeral Home when you got there, as far as the Sheriff's office and the Undertaker was concerned?

A. We arrived at the Undertaking Home and Mr. Carlin, Mr. Becker, Mr. Key and Marcus Campbell.

[fol. 99] Q. Who is Marcus Campbell? You say Campbell and Carlin?

A. They were connected with the Collins Funeral Home.

Q. Mr. Matteer, what was the purpose in taking Asheraft over there at that time?

A. For him to identify the body.

Q. State to the jury what was done on that occasion?

A. When we arrived there we opened the door to the Morgue—I guess it was—and Mrs. Asheraft was on the slab or cooling board with a sheet over her when we walked in, and Mr. Becker pulled the sheet down and Mr. Asheraft walked up to the side, identified her, and patted her on the arm and said;—you have been so good to me. And then they made a search in the presence of Mr. Asheraft, for any money pinned to her under-garment. Unbuttoned her dress and took the pin off too and cut the straps and found no pouch, or signs of pouch having been pinned there.

Q. Any money found pinned to the under garment?

A. No, sir.

Q. I will ask if at that particular time Mr. Asheraft made any effort to walk around the body to determine in what manner she came to her death?

A. No, sir.

Q. State whether or not he asked whether she was shot or how she was killed?

A. No, sir.

Q. I will ask you if at the under-taking establishment at [fol. 100] that particular time, he showed any emotion at all?

A. No, sir; he was calm about it.

Q. After you completed your task at the under-taking establishment, what did you do then?

A. Came to the County Jail and Mr. Asheraft came up with Mr. Davis and myself.

Q. When you came here what did you do with him?

A. Had him to sit in the back office as Mr. Becker wanted to talk to him.

Q. Was he under arrest at that time?

A. No, sir.

Q. Mr. Matteer, did you lock him up at that time?

A. No, sir.

Q. Did you have anything further to do with him after that time?

A. No, sir.

Q. I want to ask you if on the next day, you had occasion to go back to the vicinity of the slough?

A. Yes, sir. Went back the next morning.

Q. And what was the purpose of going out there the next morning?

A. To see if we could find any blood or the place where there had been a struggle or anything we could find.

Q. Did you, at that particular time, walk around parts of this slough where it happened?

A. Yes, sir; walked on east of the slough, underneath the [fol. 101] bridge as far as I could go and back south of the slough; I didn't get around the northwest end of it.

Q. Did you find any blood of any kind at that time?

A. No, sir.

Q. Did you find any signs of a struggle?

A. No, sir.

Q. Mr. Matteer, I want to ask you whether the water from the slough,—did that water project under the bridge or not?

A. No, sir.

Q. I show you this photograph and ask you whether this shows the condition that existed at that time?

A. Yes, sir.

Q. That is the condition with reference as to where the water was from the bridge?

A. Yes, sir.

Q. There was none under it?
A. No, sir.

Gen. Gerber: I introduce this photograph in evidence and mark it Exhibit "R" to the testimony of this witness.

(Inspection of photograph by the jury.)
(Exhibit introduced and so marked.)

Q. Now Mr. Matteer, on that occasion the following morning when you went out there, did you make investigation of any other part of the immediate vicinity to see if you could find anything?

A. Yes, sir. Went all underneath the bridge and south of the slough and then coming back up to the car and walked a little south of the automobile and found the bank books and a pair of rosary beads and a handkerchief.

[fol. 102] Q. You say south of where you found the car was a place where you found the articles you just enumerated and south of the intersection of the road which leads down to the slough?

A. Yes, sir.

Q. About how far south?

A. About 30 feet.

Q. State to the jury whether the articles you found on the embankment were off the roadway or where?

A. Found on the embankment off the road.

Q. How far?

A. About 10 or 15 feet.

Q. State whether or not at that particular time you could see the bank book down there?

A. Yes, sir.

Q. I show you two bank books, one of Mr. and Mrs. E. E. Asheraft on the Union & Planters Bank & Trust Company, which shows a deposit on May 31, 1941, $1600.00. Is that one of the books?

A. Yes, sir.

Q. I show you another on the Union & Planters National Bank & Trust Company, made out to Mr. and Mrs. E. E. Asheraft.

A. Yes, sir.

Q. I will ask you if that shows a balance on May 31, 1941, of $3034.30?

A. Yes, sir.

[fol. 103] Q. I want to show you two handkerchiefs and ask you if they were the ones found on the embankment that morning?

A. Yes, sir. This one on the ground; this one was struck in the weeds a little bit.

Q. And the rosary beads are the ones you found there at that time?

A. Yes, sir; on the top of the bank.

Gen. Gerber: I want to place these bank books, the rosary beads and the two handkerchiefs in evidence and mark them Exhibit "S" to the testimony of Mr. Matteer.

(Inspection by the jury.)

Q. Now Mr. Matteer, where you found the body of Zelma Ida Ashcraft is located in Shelby County, Tennessee?

A. Yes, sir.

Q. And before the finding of the indictment in this case?

A. Yes, sir.

Gen. Gerber: Take the witness. Pardon me a moment. I think I failed to offer the dress. I offer the dress and the pin in evidence, and mark it Exhibit "T" to the testimony of Mr. Matteer. They go together. Take the Witness.

The Court: Gentlemen, we will take a little recess.

Gen. Gerber: You are not connected with the Sheriff's Office now?

A. No, sir.

Q. You are somewhat impaired in your walking at this time?

A. Yes, sir.

[fol. 104] Cross-examination.

By Mr. Bickers:

Q. Mr. Matteer, where you have indicated by an "X" that is the Austin Peay Highway?

A. The Raleigh Road.

Q. You indicated by an "X" where you found the automobile pointed in the wrong direction?

A. Yes, sir.

Q. Some 25 or 30 feet from where the automobile was marked to the bottom of the fill?

A. I don't know, it varies in different places as you go along—on the highest I imagine it is 6 feet, 8 feet or 12 feet.

Q. Do you recall how much of the fill to the highway is above the main ground where the slough is located?

A. No, sir; I don't know. I would say 15 to 20 feet from the top to the water.

Q. Mr. Matteer, when you—I don't think you quite got through the testimony there relative to the conversation with Mr. Gambreal?

A. Yes, sir.

Q. As I understand it you went over on across the street to Mrs. Gambreal's house, across the street from where Mr. Ashcraft lived?

A. Yes, sir.

Q. You went over there to find out whatever you could [fol. 105] find out about Ashcraft or something about it?

A. Yes, sir.

Q. While you were talking to her she turned and said, there he comes now.

A. Yes, sir.

Q. He had his work clothes on?

A. Yes, sir.

Q. And when he walked up you told him you had some very sad news for him?

A. That is right.

Q. You told him his wife had been murdered?

A. Told him we found his wife down here in a slough of water and it looked like she was murdered.

Q. And he turned and said; no, my wife left at 3:30 this morning?

A. Yes, sir.

Q. What else did Mrs. Gambreal say while there, the two of you?

A. Nothing at all.

Q. And he just remarked—not my wife, she left at 3 this morning?

A. Yes, sir.

Q. Mrs. Gambreal was there?

A. No, sir. She said here he comes down the street, and I left and walked over to him.

Mr. Bickers: That is all.

[fol. 106] Cross-examination.

By Mr. McCormick:

Q. Mr. Matteer, you say you received a call about 4:30?
A. Yes, sir.
Q. In the afternoon of June 5th and you were directed or were you directed to go out to the place on the Raleigh Road where the car was found?
A. Over the radio, the Squad Car.
A. I say, you were directed?
A. Yes, sir.
Q. You looked into the car standing on the highway where you found it?
A. Yes, sir.
Q. June 5th was Friday?
A. That is right.
Q. The sun was shining?
A. I guess so.
Q. This was a new highway there?
A. It was at that time.
Q. It was at that time?
A. Yes, sir. Gravel.
Q. Dusty, was it?
A. Yes, sir.
Q. What?
A. Yes.
Q. You were told by Mr. Ashcraft his wife had left home [fol. 107] about 3:30 o'clock that morning?
A. Yes, sir.
Q. Now the car—it is true the car had been standing there on the highway at that point all of that day,—certainly up to the time you found it there, so far as you know?
A. Yes, sir.
Q. That section—this is in what was known as Wolf or Hatchie River.
A. The second bridge from Raleigh over the Wolf River.
Q. That is—in the night time that is a very dark place?
A. Yes, sir.
Q. Trees all around there, is that right?
A. Yes, sir.
Q. In building the highway the Government had to build up the road they had to build there—had to raise it?
A. Yes, sir; I imagine they did—yes, sir; I know they did.

Q. As a matter of fact, they got a lot of dirt out of the pits where the water would — found?

A. I don't know.

Q. The road was built up high?

A. Yes, sir.

Q. The old road—you knew the old road?

A. Yes, sir.

Q. You said it was about 15 or 20 feet down to where the water is at that point?

A. From that point down to the water?

[fol. 108] Q. Yes?

A. No, sir. Down the highway—from the point of the water to the point of the automobile, it is a pretty good distance.

Q. About how far would you say that was—that is what I want to know to the best of your judgment?

A. I would say about 300 feet.

Q. Down to the water?

A. Yes, sir.

Q. That road goes off on the top of the road down to the water, does it not?

A. Yes, sir.

Q. That road down to the slough from the automobile down to—that is about 300 feet down to the slough—it stopped there?

A. Yes, sir; stopped there.

Q. That neighborhood there, there are a number of —there is a negro settlement south of this point down this way?

A. No, sir; I think everyone are white people or tenants that live from the National Cemetary, down to that place; I am not sure; I think so.

Q. That new road is the Austin Peay Highway, was the main road and a muchly traveled road?

A. Yes, sir.

Mr. McCormick: I believe that is all I want to ask him.

(Witness Excused.)

[fol. 109] The Court: Gentlemen, we will now take a ten minute recess.

WILLIAM A. WATERBURY, the next witness in behalf of the State, having been first duly sworn, testified as follows:

Direct examination.

By Gen. Gerber:

The Court: Gentlemen, I have noticed some of the jurors have taken a pen out of your pocket—I don't think any of you have been making notes of what the witnesses say. That is not permitted. You can't make notes on what any of the witnesses testify to. You have to listen to the evidence and retain it in your mind. I don't say any of you gentlemen have been taking notes, you might have been just "doodling".

Juror: I was not making a memorandum of the testimony but just a memorandum of questions I want to ask at the proper time.

The Court: I am not picking out any particular juror. I don't think any of you have been making notes. I just wanted to caution you that is not permitted. I just stated to you that you can doodle with your pencil but not take notes. I am not thinking of any particular juror at all.

Q. State your name to the Court and jury.

A. William A. Waterbury.

Q. Where do you live at this time?

A. Between the second bridge and Raleigh.

[fol. 110] Q. There is one bridge south of Raleigh and another immediately south of the other bridge?

A. Yes, sir.

Q. I want to show you a photograph introduced as Exhibit "A" to Mr. Matteer's testimony and ask you if that shows the second bridge you are talking about on the Raleigh Road?

A. Yes, sir the second bridge.

Q. You live between the two bridges?

A. Yes, sir.

Q. And just where did you live Mr. Waterbury?

A. Between the two bridges on the old car line bed, approximately 250 yards from the old highway where the body was found.

Q. That shows the second bridge from Raleigh, some water on the left, the bridge road off from that; you lived on that road?

A. No, sir; back from that road some distance up on the embankment.

Q. Where the old car line traveled sometime ago?

A. Yes, sir.

Q. You testified to the jury the location where you lived from the slough, is about 250 yards?

A. Yes, sir.

Q. Mr. Waterbury, on the night of June 4th or early morning of June 5th, where were you employed?

A. The Firestone Tire and Rubber Company.

[fol. 111] Q. What time did you quit work that morning?

A. 2 a.m.

Q. Of the 5th?

A. Yes, sir.

Q. Were you walking or riding or how were you going to and from your work?

A. Driving my car.

Q. I will ask you after you finished work at Firestone's, if you had occasion to drive home?

A. I did.

Q. And whether you drove out the Raleigh Road?

A. I did.

Q. You drove out on the Raleigh Road?

A. I did.

Q. Mr. Waterbury, when you reached the second bridge south of Raliegh, I will ask you to state to the Court and jury whether you saw an automobile or anything of the kind, parked on either side of the road?

A. I did not.

Q. And, particularly, did you see any kind of a car parked on the wrong side of the road just south of the second bridge?

A. No, sir.

Q. You saw no car of any kind at that time?

A. No, sir.

Q. State whether or not it was light or dark at that time?

A. It was dark.

[fol. 112] Q. Were the lights burning on the bridge at that time?

A. No, sir.

Q. Had the lights ever been turned on from the time of the construction of the bridge?

A. No, sir.

Q. You continued homeward after you passed the bridge; what did you do after you got home?

A. I had a cyst on my neck and my wife dressed it and I went to bed and to sleep. The doctor had lanced it and she dressed it, and I went to bed.

Gen. Gerber: That is all—just a moment; about what time did you pass that second bridge south of Raleigh?

A. About 2:25 a.m.

Gen. Gerber: That is all Mr. Waterbury.

Cross-examination waived by counsel for defendants.

(Witness excused.)

G. C. PIPPIN, the next witness in behalf of the State, being first duly sworn, testified as follows:

Direct examination.

By Gen. Gerber:

Q. State your name to the Court and jury please sir.

A. G. C. Pippin.

[fol. 113] Q. Mr. Pippin, you have lived in this County how long?

A. All my life.

Q. On the early morning of June 5th, 1941, where were you living at that time?

A. Two miles northwest of Raleigh on the Millington Pike.

Q. What business were you engaged in at that time, if any?

A. Retailing milk—selling milk.

Q. I will ask you if on the early morning of June 5th, 1941, you had occasion to come to Memphis with any milk?

A. Yes, sir.

Q. What time do you recall leaving home on that morning?

A. At 3 o'clock.

Q. In coming to Memphis that early morning, did you have occasion to pass the second bridge south of Raleigh?

A. Yes, sir.

Q. When you passed that bridge state to the jurors whether you saw an automobile of any kind parked anywhere in the vicinity of that bridge?

A I saw one parked just south of the bridge on the west side of the road.

Q. What direction was the car facing, if you recall?

A. North.

Q. Towards Raleigh?

A. Yes, sir.

Q. What time did you pass the Bridge?

A. About 3:25 A. M.

[fol. 114] Q. Is that right?

A. Yes, sir.

Q. At that particular time you saw a car on the west side of the Raleigh Road—wrong side towards Raleigh?

A. Yes, sir.

Q. Did you stop at that time?

A. No, sir.

Q. You kept on to town?

A. Yes, sir.

Q. When you completed your work on that particular day, June 5th, 1941, did you have occasion to drive home out the Raleigh Road?

A. Yes, sir.

Q. What time would you say it was that you passed the second bridge south of Raleigh?

A. About 1:10 or 1:15 in the afternoon

Q. State to the Court and jury whether the car was still there at that time?

A. Yes, sir.

Q. The car was still there?

A. Yes, sir. We went to talking about it.

Q. The car was still there at that time?

A. Yes, sir.

Gen. Gerber: Take the witness.

Cross-examination waived by counsel for the Defendants.

[fol. 115] (The witness was excused.)

CHARLES SIMPSON, the next witness on behalf of the State being first duly sworn, testified as follows:

Direct examination.

By Gen. Gerber:

Q. State your name to the Court and jury?
A. Charley Simpson.
Q. Where do you live at this time?
A. At Egypt Center.
Q. That is where with regard to Raleigh?
A. Three and a half miles north.
Q. And you have lived there how long?
A. Right about 23 years.
Q. At the present time what business are you engaged in?
A. Grocery business right now.
Q. Where were you employed on the night of the 4th or the early morning of the 5th of June, 1941?
A. At the Commercial Appeal.
Q. Where were you working there?
A. In the mailing room.
Q. In traveling from Egypt Center and Raleigh to the Commercial Appeal to work and going home on that particular early morning of June 5th, did you or not travel the Raleigh Road?
A. Yes, sir.
[fol. 116] Q. What time did you get off from work that morning?
A. Right at 2:30.
Q. Then where did you go?
A. To the Pantaz drug store.
Q. Did anybody go with you?
A. Yes, sir; some friends.
Q. What was your purpose in going there?
A. To get a malted milk.
Q. Did either of you make a purchase at that time?
A. Mr. McDonald did,—an alarm clock.
Q. State whether or not it was set in the drugstore for him?
A. It was.
Q. Who set it for him?
A. I think the druggist did, at 12 minutes after 3.

Q. After you completed your business in the drugstore and had a drink, where did you go then?

A. Straight to my car and then went to the Commercial and I put Mack out at the Commercial and went straight on home. I didn't stop at the Commercial at all.

Q. On your way home state to the Court and jury if you had occasion to go out the Raleigh Road?

A. Yes, sir, had to go that way.

Q. State to the Court and jury if at the time you reached the second bridge south of Raleigh you saw anything parked in the vicinity of that bridge?

[fol. 117] A. An automobile parked there.

Q. Where was it parked?

A. On the left hand side, facing north on the wrong side of the road towards Raleigh.

Q. On the wrong side, towards Raleigh?

A. That is right.

Q. What time did you pass there?

A. 20 minutes to 4.

Q. At that particular time did you see anybody around the car?

A. No, sir.

Q. Was it light or dark?

A. It was dark.

Q. You passed by about 20 minutes to 4?

A. Yes, sir.

Gen. Gerber: That is all.

Cross-examination Waived by Counsel for the Defendants.

(Witness excused.)

JOHN J. MCDONALD, the next witness in behalf of the State, being first duly sworn, testified as follows:

Direct examination.

By Gen. Gerber:

[fol. 118] Q. State your name to the Court and jury?

A. John J. McDonald.

Q. Where are you employed?

A. At the Commercial.

Q. Been with them how long?

A. For 30 years.

Q. Where do you live?

A. Between Raleigh and Bartlett. On the Raleigh Road.

Q. In going to and from the City of Memphis from where you live, was it a custom for you to travel the Raleigh Road?

A. It is.

Q. Were you working on this morning of June 4th at the Commercial?

A. Yes, sir.

Q. What time did you discontinue work?

A. 2:30 o'clock in the morning.

Q. When you finished, did you and the other gentlemen go anywhere?

A. Simpson and I went to Pantaze on this particular morning.

Q. Did you make a purchase there?

A. A Big Ben Alarm Clock. I asked him to set it for me and he asked for the time and I told hi-, 3:12 and he set it at 3:12.

Q. After you had a drink and he set the clock, where [fol. 119] did you go then?

A. Got in Simpson's car and he took me to the Commercial and I got in my car and went straight home.

Q. In going home that particular night, state to the Court and jury whether you passed the second bridge south of Raleigh on the Raleigh Road?

A. Coming to the second bridge going on towards Raleigh, I noticed a car parked on the wrong side of the road. Being a new bridge and road, I thought something was wrong and I turned the auto lights towards the other car—towards the car and a man come from the left hand side and walked to the back of the car and looked like he was fooling with the gas tank, and I was 6 feet from the man and he didn't look at me or didn't say anything to me, and I thought if he had trouble he would holler, and I pulled on off.

Q. At that particular time was it light or dark?

A. It was pretty dark.

Q. Could you tell at that particular time whether the object on which you threw the light was a white man?

A. No, sir; it was pretty dark—the light was not on him, and I couldn't tell whether he was a white or colored man.

Q. At that particular time what time was it?

A. 3:40 or 3:45.

Gen. Gerber: Take the witness.
[fol. 120] Mr. Bickers: No questions.
Mr. McCormick: No questions.

(Witness excused.)

MARCUS CAMPBELL, the next witness, being first duly sworn, testified as follows:

Direct examination.

By Gen. Gerber:

Q. State your name to the Court and jury.
A. Marcus Campbell.
Q. Mr. Campbell, where are you employed?
A. Collins Funeral Home.
Q. You have been with them for how long?
A. 23 years.
Q. I will ask you whether you were employed by the Collins Funeral Home on the 5th of June, 1941?
A. I was.
Q. And whether you were there when the body of a woman named Mrs. Zelma Ida Asheraft was brought there?
A. Yes, sir.
Q. Mr. Campbell, I will ask you at any time while the body was there if anybody came out there and viewed the body?
A. Yes, sir.
Q. Do you remember who it was?
A. Yes, sir; Mr. Asheraft came in with the deputies.
[fol. 121] Q. With the deputies?
A. Yes, sir.
Q. When they came out there that evening, I will ask you if Mr. Asheraft had an opportunity to view the body?
A. Yes, sir.
Q. And whether he identified the body as that of his wife?
A. Yes, sir; he did.
Q. Did you have an opportunity to view the wounds on this body?
A. I did.
Q. Where were the wounds?
A. On the head and the face there.

Q. The wounds you saw on the head—by the way, have you had much or little experience with bodies of persons who have met death by violence?

A. Quite a great deal.

Q. The wounds you say you found on the head at that particular time, if the object on whom the wounds were inflicted, had been sitting or standing at the time the blows were struck, would the blood flow lightly or gush, or what would happen?

A. Would have gushed and bled profusely from the arteries up about the head.

Q. The blood would have flowed profusely?

A. Yes, sir.

Q. At that particular time when the investigation was made of the body brought there, did you have occasion to view the dress and garments that this woman had on?

[fol. 122] A. I did.

Q. I want to show you Exhibit "T" to Mr. Matteer's testimony. State whether or not this is the dress she was brought there in on this particular night?

A. Yes, sir.

Q. Mr. Campbell, I wish you would state to the jury whether any blood was on the dress at that particular time?

A. When we brought her in, no blood was on it.

Q. I note on the dress there is some blood—come down here a minute. (Inspection of dress by the witness.) Is this blood?

A. No, sir; that is dye.

Q. I note down here on the bottom of this side, is this blood?

A. Yes, sir.

Q. How did it get on there?

A. It was on our cooling board, and we had to take the dress off over the head where her wounds were.

Q. You took the dress off over the wounds?

A. Yes, sir.

Q. After you placed the body in the Morgue, I will ask you whether those wounds emitted any blood?

A. Yes, sir.

Q. Where did that blood go?

A. On the board.

Q. And when you took the dress off, did blood get on it?

A. Yes, sir.

Q. At the time the body was brought in there was no blood on the dress at all?

A. No, sir.

Q. Mr. Campbell, state to the Court and jury whether at that particular time any investigation was made in particular of Mrs. Ashcraft for the purpose of trying to find anything?

A. Yes, sir.

Q. What was done?

[fol. 123] A. We felt up around where she was supposed to have a small leather or chamois bag, supposed to have money in it and we couldn't feel it and opened the dress.

Q. Do you remember this pin here?

A. (Inspection of pin by the witness) Yes, sir.

Q. Was that just below the top button?

A. It was all buttoned.

Q. In making the investigation, you say the pin was taken off?

A. Yes, sir.

Q. The buttons unbuttoned?

A. Yes, sir.

Q. In the presence of Mr. Asheraft?

A. Yes, sir.

Q. Was there any pouch of money found on the body?

A. No, sir.

Q. I want to show you a garment. I notice these straps—I want to ask you whether there was an effort made to see if anything was pinned to it?

A. Looked for the pin holes and didn't find them. They cut the string off.

Gen. Gerber: I introduce that as Exhibit "A" to the testimony of Mr. Campbell.

(So marked Ex. "A" to Campbell's testimony)

Q. Mr. Campbell, I will ask you if the time Mr. Ashcraft was brought to your place that night of June 5th with the deputy, whether at any time, he asked you or anybody [fol. 124] in your presence, how his wife met her death?

A. He did not ask me.

Q. I will ask you if at any time he came around to the body to try to view the head wounds or the wounds on the body?

A. He was at the side of the table.

Q. He didn't come around?
A. No, sir.
Q. Did he ever ask you or anybody else in your presence, where the body was found?
A. I don't remember that.
Q. Did he ask you to take him to the place where the body was found?
A. No, sir; he never did.
Q. Now Mr. Campbell, I will ask you if after an identification was had in your presence by the deputies and the defendant, Asheraft, what, if anything was done with the body?
A. Sent to the John Gaston Hospital for an autopsy.

Gen. Gerber: Take the witness.

Cross-examination waived by counsel for the Defendants.

(Witness excused.)

Dr. R. H. Rigdon, the next witness in behalf of the State, being first duly sworn, testified as follows:

[fol. 125] Direct examination.

By Gen. Gerber:

Q. State your name to the Court and jury please?
A. Dr. R. H. Rigdon.
Q. You now live where?
A. Little Rock, Arkansas.
Q. You have been there how long?
A. Since January of this year.
Q. What is your business over there?
A. Professor of Pathology at the medical school.
Q. What University?
A. University of Arkansas.
Q. You were formerly located here in the city of Memphis; is that right, Doctor?
A. Yes, sir.
Q. Where did you receive your medical education?
A. I received my medical education at Emory University, Atlanta.
Q. I will ask you in June, the 5th of June, 1941, where you were engaged in work?

A. I was here in Memphis engaged at the University of Tennessee.

Q. What were you doing at the University of Tennessee?

A. Associate Professor of Pathology at the University of Tennessee.

Q. Doctor, I will ask you if at any time in June, 1941, you [fol. 126] had occasion to perform an autopsy on the body of a woman, Mrs. Zelma Ida Asheraft?

A. I did, June 5th.

Q. And I will ask you if at that particular time, you found wounds on her head—on the head of that particular individual?

A. I did.

Q. What did you find Doctor, in the way of wounds?

A. There were several large wounds on the top of the head and openen.

Q. How, in your opinion, were the wounds caused; I mean, by some straight object or some rugged object?

A. I think, more than likely, they were caused by some rugged object.

Q. I want to show you a photograph here Doctor, and I will ask you to state to the Court and jury if this photograph shows the wounds as you viewed them at the time at that autopsy of June 5th, 1941, on Mrs. Zelma Ida Asheraft?

A. Yes, sir.

Q. They show the wounds in that head at that time?

A. Yes, sir.

Gen. Gerber: I want to introduce this photograph in evidence and mark it Exhibit "A" to the testimony of Dr. Rigdon.

(So marked and inspected by the jury of Exhibit "A".)

Q. Doctor, do you recall how many separate gashes or wounds you found in the head of Mrs. Asheraft at that time?

A. Either—I think four; I can check it here; four wounds, [fol. 127] and I think some smaller wounds; but four major wounds are shown up here.

Q. The wounds you observed in the head at that time, would they cause a light flow of blood or a gushing?

A. A very large amount of bleeding would occur and there would be a spurting.

Q. State to the Court and jury whether the wounds you

found at the time of the viewing of the body on the occasion of the autopsy, would cause death.

A. Yes, sir. In addition to these in the skull, there was also hemorrhages in the brain tissue; not only the wounds themselves would cause death but in addition to this, there was an injury to the brain.

Q. Would the injuries you found cause death?

A. Yes, sir.

Q. At that particular time did you find bruises or wounds on the cheek and face of this woman?

A. Yes, sir. Her nose was bruised and she had some bruises on the cheek here.

Q. I show you this photograph and ask you if that shows bruise wounds there at the time?

A. Yes, sir.

Gen. Gerber: I want to introduce that photograph and mark it Exhibit "B" to the testimony of Dr. Rigdon.

(So marked as Ex. "B" to the witness and inspection by the jury.)

[fol. 128] Q. Dr. Rigdon, at the time you performed the autopsy, state to the Court and jury whether you observed that the woman had had some previous operations?

A. Yes, sir. She had had some previous operation and I found the scar in the lower half of the abdomen and found the organs had been removed at this operation.

A. State whether or not the ovaries or the Fallopion tubes had been removed?

A. Both tubes and the greater part of the ovaries were removed.

Q. I will ask you if in the condition you found her, she was capable of bringing a child into the world?

A. No, sir.

Q. She could not have a child?

A. No, sir.

Q. What was the condition of the hands in so far as the finger tips or the nails were concerned?

A. I didn't observe evidence of injury.

Q. You didn't observe any evidence of injury to the finger nail or tips?

A. No, sir.

Q. Did you remove any tissue and send the tissue to any other doctor for the purpose of examination?

A. I did. Took out for examination all the tissues and had those examined.

Q. Who did you turn it over to?

[fol. 129] A. Dr. Morrison.

Q. Who was he?

A. Chemist out at the school, the University of Tennessee.

Q. From the condition of this woman Doctor, as you found her at that particular time, what would you say as to her ability to have successful sexual intercourse?

A. Well, it is difficult to give an answer to that, due to the fact that from her—may I use the term, the anatomical condition, she could have intercourse, but there are some other things necessary to have intercourse, so far as I understand it, but from her physical condition, there is no reason why she could not have had the actual intercourse.

Gen. Gerber: Take the witness.

Cross Examination was waived by Counsel for Defendants.

Gen. Gerber: I want to recall the witness.

Q. Dr. Rigdon, I asked about her ability to have a sexual intercourse. I will ask you whether your examination developed she had been raped?

A. I found no evidence of that.

Gen. Gerber: That is all.

(Witness Excused.)

Thereupon, a recess was had until 2 p.m. same date, November 25, 1944, at which time Court reconvened, and [fol. 130] the taking of the State's proof was continued as follows:

The Court: Gentlemen, are you ready?

GEORGE A. BECKER, the next witness in behalf of the State being first duly sworn, testified as follows:

Direct examination.

By Gen. Gerber:

Q. State your name to the Court and jury?

A. George A. Becker.

Q. Mr. Becker, where are you employed at the present time?

A. I am Deputy State Fire Marshall for the State of Tennessee in charge of the Western District of Tennessee,—from the Tennessee to the Mississippi River—the Kentucky line to the Mississippi River—Mississippi line.

Q. Mr. Becker, where were you employed on June 5th, 1941?

A. In the Sheriff's office of Shelby County, Tennessee.

Q. What were your assignments at the time?

A. In charge of the Homicide Bureau, and Identification Bureau.

Q. When you say the Identification Bureau, what do you mean?

A. Where they take finger prints, make pictures of scenes of crimes and such things as that.

Q. Where was your office when you were head of the Homicide Bureau and in charge of Identifications?

A. In the northwest corner on the fifth floor of the building.

Q. At that time and at that place, did you have office [fol. 131] equipment and all the paraphernalia for the taking of finger prints, etc?

A. Yes, sir; we did.

Q. On the 5th of June, 1941, state to the Court and jury whether you had occasion to go anywhere in the vicinity of Raleigh that afternoon?

A. I did, yes, sir. About 4:40 I was told by——

Q. Don't state what you were told.

A. All right. I had orders to go to the vicinity of Raleigh where a woman's body was found floating in the slough.

Q. When you got that information where did you go?

A. My partner, Mr. Key and I drove out on the Raleigh Road, and came to the second bridge this side of Raleigh, the one that comes to Wolf River, and crosses there. We

came up and parked on the west side of the road. Mr. Davis, a deputy at that time, was standing at the back end of the car and we drove up and he waved us down on a little dirt road on the left hand side of the road. And there was an ambulance there, a large ambulance, and the body of a white woman lying on a stretcher on her back, she had a pair of white, low shoes and a striped dress, and hung in the top of her head was a pair of eye glasses. In the top of her head were six big wounds and her nose was bashed in.

Q. I will ask you if at that time there was any wrist watch or rings of any kind on the body?

A. The only ring was a wedding ring, no wrist watch; a [fol. 132] plain gold band ring.

Q. At that time, was the woman living or dead?

A. She was dead.

Q. Did you have occasion at that time to examine the outer garments the woman was wearing?

A. Yes, sir. We looked at them, that is, the dress and it was buttoned up all the way and the upper part there was a large gold pin.

Q. Now, I show you a dress laying before the jury with buttons up to the top and the pin, and I will ask you if that is the dress and the pin you saw on the body of the woman at that time?

A. Yes, sir.

Q. They have been introduced as Exhibit "T" to the testimony of Mr. Matteer. Mr. Becker, at that time, did you make a close investigation of what you saw there?

A. Yes, sir, we did. We examined——

Q. At that time did you see any blood of any kind on the dress?

A. None on the dress or nowhere about her. I pressed the wound open on the top of her head with my finger, and there was no blood in the wound and I turned the body over to see if there was any blood on the back, and there was no blood on the back of her.

Q. At that particular time, was the body sent anywhere? [fol. 133] A. Yes, sir. After we got through examining the body, Collins' ambulance was there and we told the driver to take the body to the Funeral Home but not to disturb it in any way until we got there.

Q. After the ambulance left with the body what, if anything, did you do in the immediate vicinity of the slough?

A. After the ambulance left with the body we looked around the slough—all around the east side, to see if we could see any evidence of a struggle or anything of the kind.

Q. Did you find anything?

A. No; we did not.

Q. Did you find any blood anywhere around the slough?

A. No, sir.

Q. After you sent the body to Collins' undertaking Establishment and examined for blood or a struggle around the slough, where did you go then?

A. Back to the automobile and examined the automobile.

Q. Tell the jury what the conditions were with reference to the automobile?

A. The left front door of the car was open, the engine switch was on position; the brake was not set, no lights burning in the car; not in gear. In the front seat of the car was a woman's black purse lying on the front seat, a driver's license made out to 3520 Stanton Road, and a black cloth turban, a thing you wrap around the head. That cloth was damp, a few mud spots on it, also a white towel and two boxes, one round box crushed and that box was empty, [fol. 134] marked "Amatol"; another card board box marked "Amatol" and it had twelve tablets in it, and the left side of the front seat under the wheel, a large muddy foot print. In the glove compartment, a box containing "Hinkle's Pills." On the back seat behind the driver, a suit case was lying, on the floor of the car a blanket, and we lifted it up and there were three or four cigarette stubs and there was four burned matches, and lying on the back seat of the car was a woman's hat in a paper bag.

Q. I want to show you a pocket book, previously introduced as Ex. "E" to the testimony of Mr. Matteer, and ask you if that is the pocket book you found there at that time?

A. Yes, sir; that is the pocket book.

Q. I want to show you this turban of black cloth, introduced in evidence as Ex. "H" to the testimony of Mr. Matteer, and ask you whether that is the cloth turban you found?

A. Yes, sir.

Q. And if there is some mud or anything like that on there now?

A. Yes, sir; there is still some mud on that turban.

(Exhibit is here inspected by the jury.)

Q. I want to show you, Mr. Becker, a towel that has been introduced in evidence as Ex. "J" to Mr. Matteer's testimony and ask you whether that is the towel you saw there?

A. Yes, sir.

Q. I want to show you a box marked "Amatol", intro-
[fol. 135] duced in evidence as Ex. "A" to the testimony of Mr. Hall, and ask you if that is the box of Amatol tablets you found there at that time?

A. Yes, sir.

Q. Where were those tablets when you found them?

A. On the front seat.

Q. You say at that particular time there were 12 tablets in the box?

A. Yes, sir.

Q. How many are now in there?

A. Seven.

Q. What became of the others?

A. I gave four to Dr. Morrison to examine and took one tablet myself dissolved in water to see what it tasted like.

Q. Mr. Becker, I want to show you a driver's license, previously introduced as Ex. "A" to Mr. Matteer's testimony, and ask you if that is the driver's license you found there at that time?

A. Yes, sir.

Q. Mr. Becker, I want to show you a—you found some Hinkle's tablets of some kind. I want to ask you what that is?

A. The bottle found in the glove compartment of the car.

Gen. Gerber: I introduce it as an Exhibit to his testimony and mark it Ex. "A". If you gentlemen want to see these, you are at liberty to see them at any time.

Q. You say you also found on the seat of the car, a crushed box, marked "Amatol"?

[fol. 136] A. Yes, sir.

Q. I want to show you a box and ask you if that is the box you found at that time, and if at the time it had Amatol Tablets or anything in it?

A. No, sir. This is the box that had none.

Gen. Gerber: I want to introduce that in evidence and mark it Ex. "B" to the testimony of Mr. Becker.

(Inspection of box by the jury, Ex. "B" to Becker.)

Q. Mr. Becker, I want to show you a box marked tabloid empirin compound, and ask you whether you found that in the car at that time?

A. Yes, sir.

Q. I want to introduce that as an Exhibit and mark it Ex. "C" to Mr. Becker's testimony.

(Inspection by the jury Ex. "C" to Becker.)

Q. You say there were some empirim tablets there?

A. I think I gave four to the doctor for examination.

A. I want to show you a paper sack here—it is old now—and a hat; and ask you whether that is the hat and paper sack that was found there at that time, previously introduced as Exhibit "M" to the testimony of Mr. Matteer?

A. Yes, sir. That is the hat.

Q. I show you the suit case introduced in evidence as Exhibit "L" to Mr. Matteer's testimony, and I will ask you if that was found there at that time?

A. Yes, sir.

[fol. 137] Q. Did you open it at any time?

A. Yes; I did.

Q. Had anybody rummaged through it?

A. No, sir; they had not.

Q. Was it closed as it is now at the time you found it?

A. Yes, sir.

Q. I show you a blanket introduced in evidence as Ex. "N" to the testimony of Mr. Matteer and I will ask you where you found that?

A. On the right hand side back of the car on the floor.

Q. Was it neatly folded together or how was it?

A. Like somebody had picked it up and thrown it in there—pitched it in there.

Q. At the time you say you found several cigarette butts and burned matches?

A. Yes, sir.

Q. I will ask you if you placed them in an envelope and brought them in here?

A. I did.

Q. I want to show you some cigarettes and matches and ask you whether they were found in the back of the car at that time?

A. I had one more than is here now; it had some strain on it and I made a chemical test to determine whether it was blood on it and destroyed it.

Q. Was there any blood on it?

[fol. 138] A. No sir; there was not.

Gen. Gerber: I want to introduce that in evidence and mark it Exhibit "D" to the testimony of Mr. Becker.

(So marked Ex. "D" to testimony of witness Becker.)

Q. Mr. Becker, I want to show you a seat to a car and ask you what that is?

A. That is the front seat cushion that came out of the car, with the foot print I spoke of.

This was introduced in evidence as Ex. "K" to the testimony of Mr. Matteer.

Q. I will ask you whether it shows the foot print on the left side under the steering wheel?

A. That is right.

Q. I will ask if in the investigation of this case you inspected the car, and what you did with reference to the front seat cushion?

A. Sprayed a preservative on it so the mud wouldn't come off and took the cushion out of the car.

Q. After you did that you took it out of the car?

A. Yes; I did.

Q. Mr. Becker, at that time I will ask you if you made a thorough examination of the car; the floor of this car to see if you could find any blood?

A. We made a thorough examination of the car and found no blood anywhere on the car.

Q. State to the Court and jury if you made an examination of the immediate surroundings of the car where it [fol. 139] was parked at that time to see whether you could find any blood?

A. We made an examination all around the car and found no blood.

Q. I will ask you if you made that examination of the rear of the car and whether you found any blood?

A. We made that examination and found no blood.

Q. I want to ask you to state to the Court and jury if you personally made an investigation from the slough up that road to the Raleigh Road where the car was parked, for the purpose of seeing if you could find any blood of any kind?

A. I did; I walked on the road from the slough to the

Raleigh Road, looking for blood or signs of a struggle and found neither.

Q. Mr. Becker, after you made your examination of this car and made the investigation which you related to the jury around and in the immediate vicinity of where the body was found, what did you do with the car?

A. After that we locked the car and I put the key in my pocket and had Deputy Davis to call Weller Brothers to tow it in.

Q. You had Weller Brothers to tow it in?

A. Yes, sir.

Q. After that was done, where did you go?

A. After that was done I went down to the slough and made a complete circuit of the slough for some distance [fol. 140] back of the water and examined and looked for a struggle, to see whether I could find any blood and found neither.

Q. None at all?

A. No, sir.

Q. After that what did you do?

A. After that Mr. Key and I got in my car and Mr. Matteer and Mr. Davis got in theirs and we drove to 3520 Stanton Road and Mr. Davis and Matteer got there before we did and we drove up Stanton Road a little piece where we could see Davis and Matteer and some other man about that time in the front yard. We all walked in the house together.

Q. How far was it from the place where the car was parked on the Raleigh Road a little south of the second bridge south of Raleigh, to 3520 Stanton Road where the defendant, Asheraft lived?

A. One and nine tenths of a mile.

Q. I will ask you if you in the course of the investigation, had occasion to drive that distance from the home at 3520 Stanton Road to the location where the car was found and how long it took you to drive from the Asheraft home to where the car was parked?

A. The speedometer showed one and nine tenths miles and at took four and a half minutes to drive, at 20 miles per hour.

Q. Mr. Becker, when you got to Mr. Asheraft's house, were you introduced to him or meet him?

[fol. 141] A. Yes, sir; Mr. Matteer introduced me to Mr. Asheraft and I told him who I was and what I was out there

for and asked him what time his wife left home and he said at 3:30 in the morning, that she was going to drive to her mother's home in Adolphus, Kentucky. Before anyone could ask another question he asked me whether she had been robbed and if her bank books were found and I told him, I don't know. I asked him what she had on her and he said she had $200.00 in a chamois bag she had made and that it was pinned to her under clothes, and she had $50.00 in the purse, and a diamond ring. I then asked if he had any servants and he said they had a maid and I asked if the maid worked that day and he looked around the house and said the beds were made up, and I asked what the maid's name was. He said Cora Taylor, and I asked if he knew where she lived, and he said no, but that he could show us; and we asked him if he would go to the undertaker's for the purpose of making a positive identification of the body, and he said he would be glad to do that.

Q. I will ask you whether, while at the defendant Ashcraft's house at that time, whether he asked you the location of where his wife's body was found?

A. No, sir; he did not.

Q. I will ask you if at that time he asked you how she had been killed, whether she had been shot, clubbed or run over or how it happened?

A. He did not.

Q. I will ask you if at that time, he asked you to take him [fol. 142] to the slough where the body of his wife was found?

A. He did not.

Q. And you then proceeded with Mr. Ashcraft to Cora Taylor's house?

A. Yes, sir.

Q. What happened?

A. Mr. Ashcraft was placed in the car of Mr. Matteer and Davis and Key and I followed in our car. They drove south on Chelsea until we came to Ash Street and turned to the right on Ash Street and stopped at a house and pulled up behind and stopped and there was an old negro woman sitting on the porch and I ask her if Cora Taylor lived there and she said she did but she was not at home and we told her to tell Cora to get in touch with the Sheriff's office when she came in.

Q. What did you do then?

A. Drove to the Funeral Home of Collins on Poplar Street—Asheraft was brought into the embalming room where Mrs. Asheraft was on the cooling slab covered with a sheet and I pulled it off and asked him if it was his wife and he said, yes. He said what a good girl she had been; and I asked him where the money was and he said pinned to her dress; and we took the pin off and unbuttoned the dress and there was nothing on her slip. There was nothing pinned to her under clothing.

Q. Did you find anything like a pin or anything like pin holes?

A. No, sir nothing at all.

[fol. 143] Q. Did you find any chamois bag or any kind of money at that time?

A. No, sir; did not.

Q. I will ask you if at the time you were at Asheraft's house, he showed any emotion after having been advised of his wife's murder?

A. No, sir.

Q. I will ask you whether at the under-taking establishment, at that time, whether he showed any emotion when he viewed the body?

A. He did not.

Q. I will ask you if he made any efforts to determine the nature of the wounds on the body?

A. He did not.

Q. Did he ask you whether she was struck, shot or how she was killed?

A. He did not.

Q. Did he ask you the location of where the body was found?

A. No, sir; he did not.

Q. Did he ask you to take him to the location?

A. He did not.

Q. Mr. Becker, after you finished your examination there at the undertaking establishment—by the way, I will ask you if, before going further—I notice a little blood on the dress now. How did that get on there?

A. In taking the dress off over on the head, in taking the dress off it got on there from blood that was on the cooling board.

[fol. 144] Q. After the examination was concluded, where did you go?

A. After we concluded the examination of the body there, Mr. Asheraft was sent on up to the jail and I stayed there.

Q. What was your purpose in sending him to the jail?

A. To talk to him and learn all I could about his wife's death was the reason we brought him here, and I stayed at the undertaker's, and I called you and told you about it and you said you would send an assistant up to help me. I sent Key to get photographic equipment and took pictures of Mrs. Asheraft's body.

Q. You took pictures of the wounds on the head, body and nose?

A. Yes, sir.

Q. After those photographs were taken, what did you do then?

A. Came on up to the jail.

Q. State to the Court and jury whether or not an autopsy was arranged for?

A. There was, yes, sir.

Q. What did you do when you came to the building here?

A. I came back to the jail and Asheraft was sitting downstairs on the first floor, and a man by the name of Smith was with him, and I got him and came on up to the fifth floor of the building where the office is located and talked to him and asked him to start at the beginning and tell what he knew about it. He said his wife was making a trip to Adolphus, visiting her mother, and they set the alarm clock at 3 o'clock and they got up and he prepared for his wife some coffee and some grape fruit juice, and [fol. 145] carried her suit case out and placed it in the car. We talked to him a short time, and we got word that Cora Taylor had called the office, and she was brought here, and Asheraft was asked to sit in the corridor, and we talked to Cora Taylor. We talked to her a short time and sent out and got a negro named Plummer and another named Kimbrough, I believe, and they were brought up and we talked to them, I imagine from the time we started to talk to Cora Taylor, and went back to Asheraft, was possibly in the neighborhood of two hours.

Q. State to the Court and jury if in the course of the investigation and in talking to Cora Taylor and Plummer and Kimbrough, whether you were able to connect them with this crime?

A. We were not.

Q. After you concluded talking to Cora Taylor, Plummer and Kimbrough, did you or not talk to Asheraft?

A. Yes, sir. Started again talking to him, and he told us about putting his wife's things in the car, and he told us that he got in the car and tried to start it, but there was trouble with the car, that the top radiator hose on the car leaked if it sat over night with water in the hose, and that it caused the car to miss, and that his wife was sitting there until the car started to hitting regular, and she backed out and drove on. He stated he didn't wait to see if she turned the corner at Chelsea and Stanton, but went back to the house to get some rest before going to work, and set [fol. 146] the clock for 4:30 and then got up and fixed his own breakfast and went and caught the car and drove to Bellvue and got off at that road there and started to walk out Bellvue to his work, and while walking, he stated the Superintendent came along in his car and picked him up and he rode out with him.

Q. I want to ask you if at that time anything was said about a-amytol tablet Mrs. Asheraft has taken there before she left, or about the time she left on that morning?

A. Yes, sir. He stated to us that on the Wednesday night prior to this Thursday morning, they had a sort of a party there at home, a Miss Hightower, a niece of theirs, who was a student nurse at that time, and several friends were at the house and that they had supper and a few drinks, and they had to be back at the Hospital in the neighborhood of 10 o'clock, and Mr. and Mrs. Asheraft drove them to the Hospital and on the way back home they stopped—I believe at Chelsea—Jackson and Hollywood and got some gas and oil for her to make that trip the next morning, and he went to sleep and when he did his wife was still awake; and the next morning she got to complaining of having the headache, and she took an amatol tablet at that time and stated if her head didn't get any better she would stop along the road and get a coke and take another amatol tablet.

Q. How long did you talk to the defendant Asheraft on that particular night?

A. I think until about 2 o'clock in the morning and we [fol. 147] carried him back home.

Q. Out to his home?

A. Yes, sir.

Q. I show you a photograph here and ask you what this photograph shows?

A. It shows Mr. Asheraft's home 3520 Stanton Road.

Q. Was this shrubbery along the side of the house?

A. Yes, sir. On the north side.

Q. And I show you a drive going in there?

A. Yes, sir. That is also on the north side.

Gen. Gerber: I introduce that photograph in evidence and ask it be marked Exhibit "E" to the testimony of Mr. Becker.

(So marked Ex. "E" to testimony of witness Becker.)

Q. I want to show you another photograph and ask you to tell what this shows?

A. It shows the Stanton Road, looking from Chelsea.

Q. The camera faces practically north towards this street? Merker St.?

A. Yes, sir.

Q. That street is the next street beyond Asheraft's house or the next from Chelsea?

A. Yes, sir.

Q. How many houses are on Stanton Road between Merker Street and Chelsea?

A. Three houses.

Q. That photograph you say shows Stanton Road looking from Chelsea north to Merker Street?

A. Yes, sir.

[fol. 148] Gen. Gerber: I want to introduce that in evidence and ask it be marked Exhibit "F" to Mr. Becker's testimony.

(So marked Ex. "F" testimony of witness Becker.)

Q. Mr. Becker, I show you a photograph and ask you to tell us what that shows?

A. This shows Stanton Road looking from Merker towards Chelsea.

Q. It shows the Asheraft house?

A. Yes, sir.

Gen. Gerber: I want to introduce that and mark it Exhibit "G" to the testimony of Mr. Becker.

(So marked Ex. "G" to testimony of witness Becker)

Gen. Gerber: I want to show the photograph to the jury if your Honor please.

(Inspection by the jury of Ex. "G")

Q. Now Mr. Becker, you say you talked to Mr. Asheraft until about 2 o'clock in the morning here and you took him home at that time?

A. Yes, sir; we did.

Q. Who was with you when you took him home?

A. Mr. Key.

Q. Is Mr. Key now living or dead?

A. He is dead.

Q. When you got out to the home that night, was anything done out there?

A. Yes, sir. Mr. Asheraft told us sometimes his wife [fol. 149] didn't wear her diamond ring and if not she kept it in a box around the house, and with Mr. Asheraft's assistance we searched for the ring but didn't find it, but in a chest of drawers in the front room we found a wrist watch in a drawer.

Q. At that time did that make any impression of any kind on you?

A. No, sir; none whatever.

Q. I want to show you this wrist watch and ask whether that is the wrist watch which you found out there at that particular time?

A. Yes, sir; that is the watch.

Q. Do you know whose it was?

A. Mrs. Asheraft's.

Gen. Gerber: I want to introduce the watch in evidence and marked it Exhibit "H" to the testimony of Mr. Becker.

(So marked Ex. "H" to testimony of witness Becker)

Q. Did you take the watch at that time?

A. No, sir.

Q. Mr. Becker, state to the Court and jury whether in your investigation there at the house at that early morning, whether you found any kind of blood in the house?

A. We did not.

Q. Did you find any fire arms of any kind?

A. I believe there was an old shot gun in a drawer there and found a pistol I think, a pistol and a shot gun.

Q. A pistol and a shot gun?

A. Yes, sir.

[fol. 150] Q. State to the Court and jury—you say you took him home and left him there then?

A. Yes, sir.

Q. What did you ask Ashcraft to do when you left him?

A. We left him there, and asked if he would mind coming back to the office at 2:30 o'clock in the afternoon, Friday, and he said he would be glad to, and after that we left there, drove from his house to the bridge.

A. Drove from his house out to that slough?

A. Yes, sir.

Q. That is the time you measured the distance?

A. Yes, sir.

Q. Driving from that house to the slough?

A. That is correct.

Q. I will ask you if at any time during the course of the investigation, you walked from 3520 Stanton Road down that road to Chelsea, out Chelsea to the Raleigh Road, out the Raleigh Road to this slough and made an investigation on both sides of the road?

A. Yes, sir. To see if we could find any signs of a struggle or any blood and found none.

Q. State to the jury if at any time, any place, from 3520 Stanton, down Stanton Road to Chelsea, out Chelsea to the Raleigh Road, and out the Raleigh Road to the slough, you found any blood of any kind or anything like the signs of a struggle of any kind?

A. No, sir, we did not.

[fol. 151] Q. Mr. Becker, after you left Mr. Ashcraft's house that early Friday morning about 2 o'clock and drove to the slough, where did you go after that?

A. Went home after that.

Q. You went home after that?

A. Yes, sir.

Q. Did you come down here the next morning?

A. Came down here about 8 o'clock the next morning.

Q. State to the Court and jury if at that time you made an effort to see if you could get any further prints off of the automobile found there?

A. We went to Weller Brothers and we tried in every way we knew to get finger prints off the inside and outside of the car and only got a smudges.

Q. What was the condition of the car after you found it there Thursday evening at 4:55 o'clock, what was the condition, exterior, of the car,—dusty or not?

A. Dusty at that time. The road was under repair, and a stripe down the center they oiled, the rest graveled, and the cars passing back and forth naturally would stir up the dust, the dust settled on the car and it was impossible to get finger prints off the car.

Q. You could not get any?

A. No, sir.

Q. Did you make an effort to obtain finger prints from the pocket book at that time?

A. I did.

[fol. 152] Q. And the other articles you found there?

A. Yes, sir; we did.

Q. Were you able to get any or not?

A. No, sir.

Q. On Friday did you continue to investigate the case?

A. Yes, sir; continued to investigate the case and along about Friday evening I think, I came back to the jail and Mr. Ashcraft was already here and he was taken up to the fifth floor of the jail where the office was and Mr. Battle and I talked to him and he stated at that time he had no new ideas at all as to what happened to his wife, and at that time he told us that he had found her wrist watch in a drawer of the dresser there and didn't know how it got there, that when she was not wearing it she kept it on the vacu-m cleaner box beside the bed.

Q. On that early morning about 2 o'clock at the house, when you discovered the wrist watch, did you say anything to him about it?

A. No, sir; I didn't mention it to him.

Q. You testified it made no impression on you?

A. Not a thing in the world at that time.

Q. Did he tell you what his idea was about the watch being there?

A. Stated he didn't know how it came there; that when his wife was not wearing it she usually kept *it* on the vacuum cleaner box beside the bed.

Q. Said he didn't know how it got there?

[fol. 153] A. Yes, sir.

Q. How long did you talk with him there at that time?

A. About 40 minutes—approximately, my idea of the time.

Q. State to the Court and jury in the course of the investigation you were making at that time of this case, whether you had the automobile examined or examined it yourself to the extent of determining whether or not the car was hard to start or had it had water settle on the spark plugs?

A. We had the spark plugs checked, yes sir. We had the car taken to the jail yard and it stayed there day and night from the time we got the car and no water leaked out of the radiator hose and we had no trouble in starting it or driving it either at night or day.

Q. You continued the investigation and I will ask you if at any time after Friday afternoon, whether Mr. Ashcraft had occasion to come to the jail and talk with you?

A. The following day, Saturday morning, possibly at 9:30, Mr. Asheraft and Marcus Campbell of the funeral home, and Mr. Pearson, the brother of Mrs. Asheraft, came to the jail and I talked to Mr. Asheraft at that time, down in the corridor here, and he told me Mr. Pearson wanted the body buried in Kentucky, and I told him it was perfectly all right, that they could bury her wherever they saw fit, but for him not to leave town, as we wanted to talk with him from time to time. Mr. Campbell, the undertaker had an insurance policy or policies and I took them and had them photographed and returned them to Mr. Campbell.

[fol. 154] Q. Mr. Becker, I want to show you these photostatic copies of the insurance policies on the life of Zelma I. Ballentine with the Life & Casualty Company of Tennessee, and ask you if these are the photostatic copies that were made at that time?

A. Yes, sir. Mr. Campbell had them and I got them from him.

Q. That is the same Mr. Campbell who has previously testified and who works at the Collins Undertaking Company?

A. Yes, sir.

Gen. Gerber: I want to introduce them and make it an Exhibit to Mr. Becker's testimony, marking it Exhibit "I" and Exhibit "J" to Mr. Becker.

(Exhibits so marked Ex. "I" and "J" to Becker's testimony.)

Q. How long did you talk to Mr. Ashcraft that Saturday morning?

A. The only conversation I had with him, I talked to him down there long enough to make the photographs,—in the neighborhood of 30 minutes.

Q. Did you continue the investigation of the case after that?

A. We did. Drove all over the County, talking to hundreds of people,—working day and night on the case.

Q. I will ask you if at a later time after that Saturday morning, you had occasion to see Mr. Ashcraft, and the circumstances under which you saw him?

A. Yes, sir, the following Thursday, a week from the time we found the body, Chief Deputy Perry stated that Mr. Ashcraft wanted to see us. Mr. Ezell, connected with the [fol. 155] Attorney General's office, and myself, drove to the house, and when we got there Mr. Ashcraft told us he had found a couple of women's dresses and didn't know who they belonged to, and he gave them to us, and in the course of the conversation, he said he had made a mistake about the amatol that she had taken it that night before her death, and not that morning before she left. He also told us at that time that he had been married previously to his marriage with Mrs. Ashcraft, he told us he had married a lady named Saline Fayard. Said so far as he knew at that time, the lady was living in Bay St. Louis,—he married her at Biloxi, Mississippi,—Biloxi or Gulfport, I don't remember which.

Q. Now Mr. Becker, you say you went out there at that time and he told you he had a couple of dresses he didn't know about, and told you about this amatol, now whose dresses, were they?

A. We later learned the dresses belonged to Cora Taylor.

Q. After you left Thursday, you continued to investigate?

A. Yes, sir. Worked day and night from then on.

Q. Any time after that did you send for Mr. Ashcraft or bring him to the building?

A. Yes, sir. We worked on the case practically ten days. We drove all over the county checking up on what Ashcraft had told us and could not find anything to indicate a robbery.

Q. What did you do then?

A. Sent for Mr. Ashcraft.

Q. Why?

A. Mr. Asheraft had made certain statement- to us about the amatol and about the condition of the automobile, and about this money being pinned to the dress and we wanted him to explain these discrepancies.
[fol. 156] and about 7 or 7:30 the following Saturday——

Mr. Bickers: I assume that the statement you want to go into is that—I am asking the jury be excluded until I make my objection. I want to know, however, if you are going into that.

The Court: You have me in the dark. I don't know what you are objecting to.

Mr. Bickers: I do. The record shows on that night he was handled for 36 hours.

The Court: I don't see anything yet.

Mr. Bickers: I don't want him to repeat anything about that——

Gen. Gerber: If the Court please, if Mr. Bickers is going to object to the testimony we are about to go into, let the jury retire.

Mr. Bickers: And I ask that.

The Court: Suppose you gentlemen step out in the jury room.

(The jury here retires from the court room.)

Gen. Gerber: I want to state at this time, if is not the purpose of the State to offer anything here that is inconsistent with the findings of the Supreme Court of the United States. We have no idea of offering the confession of Asheraft, but we do propose to and will insist that certain things that happened from the time this witness is testifying about now, until 12 o'clock Sunday night, were competent.

The Court: In making the objection Mr. Bickers assumed [fol. 157] the Court knew what the witness was going to testify. I don't have the slightest idea. Remember, I am in the lawsuit for the first time. I want to state at this time, up to the time you interrupted him, I don't think there is anything incompetent about the testimony.

Mr. Bickers: I tried to stop him before there was anything incompetent. Here is the proposition, if your Honor please. I believe I understood the purpose for this. Now that question has been settled—the time he was brought to the County Jail.

Gen. Gerber: Show me that in that opinion.

Mr. Bickers: I will show you this.

Gen. Gerber: Show me where it says in the opinion that everything which occurred from 7:30 o'clock that night is incompetent.

Mr. Bickers: Ashcraft testifies as soon as he was arrested he was brought into the jail and this witness asked him why he killed his wife—that was 7:30.

Gen. Gerber: That is what Ashcraft says.

Mr. Bickers: From 7:30 on to noon Monday morning, that part of the confession—has no part in this record.

[fol. 158] The Court: From reading the opinion I suppose in the previous trial there was a confession offered at this time of the defendant, Ashcraft?

Mr. Gerber: That is true.

The Court: The Supreme Court said that was wrongfully admitted.

Mr. Gerber: Your Honor understand that is what the Supreme Court held. We cannot offer the confession of Ashcraft for any purpose. Neither the opinion of the Supreme Court of the United States nor any other Court, says we do not have the right to offer proof of what happened. Of course, any statement made by Ashcraft which was not against his interest, is not in the nature of a confession, and we insist we have a right to do that, and we are not undertaking to offer here anything in the nature of a confession but offer by the witness to show what happened, —about everything except the confession.

Mr. Bickers: I take it that they want to develop from this witness that the first information they had about a negro being involved, came from this witness. I cannot complain of this but, I can of this proposition that from the time of 7:30 that Saturday night until 8:30 Monday morning what he admitted to him to be a confession, is a part of the thing itself, and part of the entire confession, and I don't think under the law that one line from the time he was brought into the jail at 7:30 Saturday night until Monday morning, under the rule of evidence, is competent. It don't hurt me for him to say during the investigation I believe about the negro killed his wife, I think that is what he wants to develop, but I take the position that this man [fol. 159] was detained, taken at 7:30 to the fifth floor of this jail, admittedly by every witness for the state, that

he was placed behind the table with a light over him, and Mr. Becker on this side, and Gen. Battle on this side, beginning at 7:30 Saturday night and ending at 8:30 Monday morning. I insist that every act of every witness in this case has been fully developed and scrutinized and passed on by the Supreme Court of the United States. I objected to that and stopped him right now, that he has no right to testify in the face of the record—four witnesses of the state admitted that they brought him in at 7:30 Saturday night and described in detail how he was placed and what happaned,—he was examined by relays. That statement was corroborated by the other 4 witnesses in the case. From that testimony I insist the line of demarkation—I cannot distinguish between 7:30 and 8:30 Monday morning, in a case where Asheraft is being tried.

The Court: Over-ruled, Mr. Bickers. Gentlemen, I understand no evidence will be offered that was ruled out by the United States Supreme Court.

Mr. Gerber: We are not going to offer anything ruled out by the Supreme Court of the United States. I just want to say to your Honor, that any statements the defendant Asheraft made that were not against his interest—were not a confession—we insist that the state has a right to offer them.

Mr. Bickers: I submit to the Court, the confessions don't [fol. 160] have to be written to be illegal. You can get a statement from a man against interest—a written statement—and it would be just as illegal. That he was confined under the circumstances they testified to and have testified to, and that he made oral admissions against interest, the manner in which they obtained them.

The Court: Over-ruled. Let the record show an exception.

(The Jury here returns to the box.)

The examination of the witness Becker, was here continued in the presence of the jury.

By Gen. Gerber:

Q. Mr. Becker you say you sent out for Asheraft. I will ask you if, in the course of the investigation, when you talked to Asheraft on that early Friday morning about 2 o'clock and the next day, Saturday, whether he made any state-

ment to you with reference to his desire to cooperate in the matter under investigation?

A. Yes, sir. When we were at his house the following Thursday afternoon after June 5 I asked him if he had gone back to work, and he said he had not that he was staying at home so if we wanted him we could get in touch with him.

Q. And that following Saturday night the 14th of June, you said you sent out after him?

A. We did, yes sir.

Q. What time Mr. Becker?

A. About 7 or 7:30 Saturday night.

Q. Who did you send after him?

[fol. 161] A. Mr. Key.

Q. When brought to the building where did Mr. Ashcraft go?

A. He was brought up to the fifth floor of the County Jail and carried into the homicide office, and Mr. Battle and I started talking to him.

Q. When you say Mr. Battle you mean one of the Assistants to the Attorney General?

A. Yes, sir; Assistant Attorney General.

Q. I was not there at that time?

A. No, sir, you were not.

Q. Mr. Becker, I want you to relate to the jury what transpired there between yourself and the defendant, Ashcraft.

A. When he was first brought in we started talking to him about himself, personalities, where he was born and I believe he stated Gillett, Arkansas, and he was 44 years old. I asked him if his parents were still living and he told me no, that his mother and father both died in Dallas, Texas. He stated both his parents died, and I believe his statement was both died in Dallas, Texas; that he had inherited a little money from his mother; and he got to talking about his former marriage, and he told us he was married to this Miss Saline Fayard in Biloxi, Miss. in 1925, and he got a divorce from her in Helena, Ark. in 1927. When she left him they were living in Memphis and he was working on a job for the Gage Construction Co. and the reason she separated was that on this particular night they were going to have company for dinner; that he had worked late and worked overtime and didn't get home and when he did she

[fol. 162] was mad at him and left him and he got a divorce from her in Helena, Arkansas in 1927 and he said he met Zelma Ida Asheraft in Helena in 1927 when he worked for the Hogan Construction Company in Helena. That he married in 1928 in Pine Bluff, Ark., when he was working there. And we got to talking to him about the killing of his wife. He had no idea about that.

Q. Did he mention to you that he had been married previously to his marriage to Saline Fayard that he was married to a woman named Ida McConnell at Little Rock?

A. He did not. I got to talking about the automobile and he stated the automobile was missing, that when he tried to start it in the morning, it was hard to start on account of water getting from the radiator on the spark plugs, and the automobile was up here and we told him we had been over it and could find nothing wrong with it, that it ran perfectly, and there was no trouble starting it. And we got to talking about the amatol, that he had told us first that his wife had taken the amatol that morning before she left and had intended to take another if her head didn't get any better, and later stated that she had taken it that night before she went to bed. He made the statement that the money was pinned to her under-clothing; and we pointed out to him there were no pin holes in it. Also pointed out to him if there had been a hold-up or robbery there was no need to pound the top of her head—that there were six separate and distinct wounds in her head. And that her clothing was not disarranged and none of the buttons off, still in place, the pin was still in place, and we didn't see how they could get the money out without tearing her dress. That the suit case was not disturbed in any way, it was the same as when she packed it; and pointed out to him we could not see, if it was a hold-up or robbery or something like that, why the body would have to be taken [fol. 163] and thrown in the slough if somebody wanted to hold her up or knock her in the head; they could have taken the money and gone on; we talked to him sometime about it; and he finally stated about 11 P. M. that it looked like everything pointed towards him. We kept on talking to him for sometime, and, I imagine, in the neighborhood of 1 o'clock that Saturday night I accused him of killing his wife, he stated he didn't kill her. We continued talking to him——

Mr. Bickers: I want at this time to object to the recital he is making now relative to the charge made at that time to the effect that he killed his wife. That is the very thing we deny.

Mr. Gerber: There is no statement of that kind——

The Court: Gentlemen of the jury, step back in the jury room a moment.

(The jury here retires to the jury room.)

Mr. Bickers: Now your Honor, this is the testimony—what it was in the other case. We also insist as to the confession—also insist the charge at 11 o'clock with having killed his wife. The Court passed on that. It was Ashcraft's testimony that the charge was at 7:30 or 8 o'clock. All right, concede they didn't charge him with that until 11 o'clock. That is co-ercive. I insist from then on out it was co-ersive, for the reason the man was incapacitated so far as giving help——

The Court: Mr. Bickers, I read that opinion and spent [fol. 164] considerable time studying the opinion.

Mr. Bickers: May I repeat it?

The Court: If you want to.

Mr. Bickers: Here is what the Court said: (Counsel here read from the opinion of the Supreme Court of the United States).

The Court: The reason I asked the jury to step out it was running through my head—through my mind, the statement Mr. Becker made that Mr. Asheraft stated that he knew everything pointed to him, but that wasn't an admission of guilt, that is what I had in mind when I asked the jury to go out,—trying to consider it.

Mr. Bickers: I don't want to argue the proposition before the jury until the time comes.

The Court: The question the Court had in mind,—the statement that Asheraft made, that everything seemed to point to him.

Mr. Bickers: After charging him with the killing of his wife by the witness?

The Court: That still is not an admission of guilt.

Mr. Bickers: May I read the opinion; I want the record to show I offered it. (Counsel here read from the opinion.) (Argument of Mr. Bickers.)

Mr. Gerber: Does your Honor want to hear from me?

The Court: Yes, sir.

Mr. Gerber: There is not a line in the opinion about the evidence now offered. We are not offering a confession as was offered in evidence on the last trial.

[fol. 165] The Court: There was a confession introduced at the time of the last trial and ruled out. The Supreme Court says it must be ruled out. This is not a confession.

Mr. Bickers: Note my exception.

(The jury here returned into the box.)

(Continuation of testimony of the witness Becker.)

By Mr. Gerber:

Q. Mr. Becker, after the defendant Asheraft had made the statement to you, that it looked like it pointed towards him, you then accused him of killing his wife, and he denied it?

A. Yes, sir.

Q. You continued to talk to him in there?

A. Myself, and Mr. Battle talked to him until about 3 o'clock in the morning. About 3 o'clock in the morning Battle and I left and Mr. Ezell was on the fifth floor, and he was talking to some other witnesses, and we told him we were going down stairs to the dormitory and we did, and stayed there until 7 or 7:30 Sunday morning, and went back and continued talking to him along the same lines until about noon on Sunday. Sunday noon we left, I believe, Ezell was talking to him; then I went home and I don't know where Mr. Battle went; I went home, took a bath and cleaned up and came back about 6 or 7 o'clock Sunday night, and continued to talk to him until about 11 o'clock Sunday night, when he asked for Mr. Ezell, and Mr. Battle and I left and Mr. Ezell went in the room and talked to him alone [fol. 166] and sent for me—came out and asked for me, and when I went in the room Mr. Ezell told Asheraft to tell me what Asheraft told Ezell, and Asheraft told me a negro killed his wife. I said what is his name. He said Tom Ware, who had worked with him on the bowling alley job. I asked where he lived, and he said I don't know where he lives, I will have to show you; I can't tell. I said, if you are putting a negro in this thing, you hired him to do it. He said; I did not; I had nothing to do with it. And he

went on and told how it happened. His wife and him went out, and the negro was in the back [illegible] when she got in the car, and the negro put his arm around her and got her pocket book and he told her this was a hold-up.

Mr. Bickers: Hold on; I object to that.

Mr. Gerber: It is no statement against interest.

Mr. Bickers: He is telling what Asheraft admitted to him; he says so. I got the testimony here.

Gen. Gerber: Go ahead.

Mr. Bickers: Your Honor overrules the objection?

The Court: Yes.

Mr. Bickers: Note my exception.

A. He stated when his wife got in the car, the negro was in the back of the car, and the negro put his arm around his wife, reached over and got her pocket book with the other hand, and told her it was a hold-up. Afterwards the negro got in the front seat and told her to back the car out and she started to back the car out and the negro [fol. 167] turned to Asheraft and said, "You old bald-headed son of a bitch, get back in the house and if you say anything about this, I am coming back and burn the house down." And the negro drove off. I said, "Asheraft, you could get to a telephone in your home when you saw that,—why didn't you call the law and tell them and he said he was a mean negro and I was afraid of him. I told him, you stood in the undertaker's and looked at the dead body of your wife; why didn't you tell us then the negro killed your wife; you didn't say a word about that and Asheraft said "that is all right, I inten-ed to take care of him". We asked him to take us to the negro's house. We then placed Asheraft in a car; there were Mr. Asheraft, Mr. Jayroe, Mr. Ezzell and Mr. Battle and myself in the car, and we drove out Chelsea to Sunset, and Asheraft told us to turn north on Sunset, we did, Mr. Jayroe was driving, and we drove on a short ways, and Asheraft told us that was the wrong street, we drove north one block to Mount Olive and then one block east to Oriole Street and turned south on Oriole and came to a house on the east side of Oriole Street, the first house north of Chelsea, and he said that was the house in which the negro lived and Ezell, Jayroe and myself got out of the car and left Battle and Asheraft in the car. We got out and went to the door and a negro man opened the door and we asked what his name was and he said

George Pryor, and we called out and told Gen. Battle to bring Asheraft up there. He brought him up and we flashed the light and put it on the negro and Asheraft looked at him and said no that is not the negro.

[fol. 168] And Pryor was asked if he knew Tom Ware and he stated he did not. And a negro woman on the bed that we later learned was Pryor's wife, stated there was a John Ware who lived next door, the next house north of this place, and it was an old store building——

Q. I show you a photograph and ask if those are the two houses,—the house in which Pryor lived and the house you later found Tom Ware in?

A. Yes, sir.

Q. The house on the right is the George Pryor house and the house on the left is where you got Ware?

A. Yes, sir.

Q. This house is the one where you found Ware?

A. Yes, sir.

Gen. Gerber: We introduce this as an Exhibit to the testimony of Mr. Becker, and mark it Exhibit "K". (So introduced as Exhibit "K" to Becker.)

Mr. McCormick: For the sake of the record, we object to the testimony of Mr. Becker given to the jury wherein he states Asheraft made the statement involving John Ware in this crime. He related several statements Mr. Asheraft is alleged to have made to him out of the presence of John Ware in this matter. That is incompetent and I make the objection.

Mr. Gerber: I think the jury should be charged that any statement made by Asheraft is only competent as to Asheraft and not as to Ware.

The Court: Gentlemen, what this witness stated the de-[fol. 169] fendant Asheraft said about Tom Ware, is not admissable against the defendant John or Tom Ware. He is indicted under his name of John Ware.

Mr. Gerber: Also alias Tom Ware.

Mr. McCormick: If your Honor Please, I didn't hear your ruling.

The Court: I instructed the jury Mr. McCormick, when you objected; that what Mr. Becker said that the defendant Asheraft stated about the defendant John Ware, was not admissable or competent against John Ware and should not be considered by the Jury against Ware.

Mr. McCormick: That is right.

Q. Now, go ahead and tell what happened when you got to Tom Ware's house?

A. After talking to Pryor, we walked to the other house, pushed open the front door and went in the house and there was a bed against the south wall and there were two negro men and a negro woman on the bed, and the negro men were on the side of the bed nearest the door and the negro man nearest the door was awake, and we had Asheraft come in, and Asheraft looked at him and said it wasn't the negro, and the other negro lying next to him had his head under the negro woman's shoulder, and the light was put on him and *Wa*sheraft stated That is the negro; We asked the negro his name and he said "John Ware, sometimes they call me Tom", and we told him to dress and put his clothes on and come ahead, and he was taken out and put in the car and brought to the County Jail. Coming back to jail in the automobile Mr. Asheraft, the negro Ware were seated in the back seat and Mr. Ezell was seated between them, Mr. Jayroe, Gen. Battle and myself were in the front seat, and when we got here to the jail we all came up to the fifth floor and both of them, Asheraft and the negro were [fol. 170] carried in the office on the fifth floor. The negro was asked if he knew the white man's name.

Q. I will ask you if at any time from the time Ware got up and was taken out to the car, whether anything at all was said by the officers to Ware?

A. No, sir.

Q. Was anything said to him from the time you got in the car until you got to the jail?

A. No, sir.

Q. I will ask you whether the defendant Asheraft and the defendant Ware had any conversation of any kind coming back to the jail?

A. No, sir.

Q. Did anybody abuse either of these defendants at any time from the time you went out to get Ware and the time you brought Ware back to jail?

A. No, sir.

Mr. McCormick: I think the jury had better go out now, we are getting down to John Ware. We had better go

into the questions. Of course the Court understand what I am talking about.

The Court: Yes, sir. Suppose you continue.

Q. Go ahead and state to the jury what happened after you picked Ware up and brought him to this building and got up on the fifth floor to your office and Asheraft and Ware were both present. State to the jury what transpired.

A. The negro was aksed if he knew him——

Mr. McCormick: That is what I am objecting to.

The Court: Take the jury out.

(The jury here retires to the jury room.)

(In the absence of the jury the following took place.)

By Gen. Gerber:

Q. Just tell the Court what happened at this time?

A. The negro Ware was brought to the office on the fifth [fol. 171] floor and the negro was asked if he knew the white man. He stated that he did—his name was Mr. Johnny Asheraft that he had worked with him on the Bowling Alley job, and he was asked if he had ever ridden in the car with him, and he stated he had, and he was asked when was the last time,—and the negro hesitated, and Mr. Asheraft——

[fol. 172] Q. Don't state to the Court anything Asheraft said at all, except he made some statement to the negro.

A. That is right, he made a statement to the negro. And the negro turned to us and said,—You want to know the truth, don't you? I said, yes, that was all. And he turned to Asheraft and said: Mr. Johnny, I told you when this thing happened, if anything ever come of it, I wasn't going to take the full blame. Mr. Asheraft then was taken to the office in the other side of the building, the southeast corner of the building and Gen. Battle and I started to talk to Ware.

Q. I want to ask you if at that particular time Ware made any statement to you as to his participation in this crime?

A. Yes, sir; he did.

Q. Was any abuse or violence practice- on him for the purpose of making him give the statement?

A. There was not.

Q. Was any promise of immunity or hope of reward held out to him?

A. There was not.

Q. I will ask you after he made the statement if it was reduced to writing?

A. Yes, sir. Henry Waldauer was called in to take the statement in shorthand, and later on it was transcribed, a typewritten copy of it.

Q. I show you here a statement reduced to writing at that time and ask you if that is the statement taken at that time?

A. Yes, sir; that is the statement.

[fol. 173] Q. I want to ask you to look at the statement and state whether or not it was executed, how and why it was so executed after the statement was typewritten—let me ask you, before I get to that, at the time the statement was made to Henry Waldauer, I will ask you whether a physician who lives here in the city of Memphis was called and came to the jail and witnessed the execution of the statement?

A. Yes, sir. Dr. McQuiston witnessed it.

Q. Was the statement read back to Ware?

A. Yes, sir.

Q. State how it was executed at that time?

A. After Mr. Waldauer transcribed the statement it was read back to John Ware, on the fifth floor. Gen. Battle read it, and offered a copy of the statement to John Ware. At that time John Ware stated that he could not read, and Gen. Battle read it—read the statement. Gen. Battle, Dr. McQuiston, Sheriff Joyner and myself were in the room at that time, and all of us had a copy of the statement. After the statement was read to him Mr. Waldauer swore him to the statement and asked him to sign it, and John Ware stated he couldn't sign his name, and he made his mark or touched the pen.

Gen. Gerber: We offer it in evidence at this time and make it an Exhibit to the testimony of Mr. Becker, and ask permission to read it to the jury. There it is.

Mr. McCormick: I don't want to see it, I got it in the book.

The Court: Do you want to ask the witness any questions?

[fol. 174] (In the absence of the jury.)

Cross-examination.

By Mr. McCormick:

Q. Mr. Becker, when you went out and picked up John Ware, you had already made the statement that if a negro killed this woman, that Asheraft had hired him to do it?

A. Yes, sir.

Q. When you went out to pick up John Ware, you had it in your mind then that John Ware murdered this woman?

A. No, sir; I didn't know.

Q. You went out there to find him and put it on him if you could?

A. No, sir; I went out there because Asheraft told us a negro named Tom Ware killed his wife.

Q. That was the line of your thought?

A. Certainly, when the man told me the negro killed his wife.

Q. You had that idea in your mind there about the negro and went out to get him? Get him for the murder?

A. No, sir; I had the statement of Asheraft alone, that is all.

Q. Ware told you he murdered the lady, he hired him to do it?

A. Yes; he told me that.

Q. You and Mr. Battle and who else?

A. Mr. Ezell, Jayroe and myself.

Q. You went out there and pulled John Ware out of bed—he was in bed with the other negro and you threw a flash [fol. 175] light on him?

A. Yes, sir.

Q. And told him to get up and dress?

A. Yes, sir.

Q. And he got up and dressed?

A. Yes, sir.

Q. Did you tell him you wanted him for the murder of Mr. Asheraft's wife?

A. I did not.

Q. Why didn't you tell him?

A. Didn't tell him anything; I didn't know; I only had Asheraft's statement.

Q. Did you tell him there Ashcraft had said you killed his wife.

A. Not out there at the house; it was very dark; it was 12 o'clock at night.

Q. 12 o'clock at night?

A. Yes, sir; dark; about that time. I don't know exactly the time.

Q. John tried to get up and pick up a pair of trousers on the wall?

A. I have forgotten where he got them from. He had a pair of pants,—I couldn't say where.

Q. Another pair on the wall?

A. I don't know. All I know is he pulled a pair of pants on.

Q. And you put him in the automobile?

[fol. 176] A. Yes; that is right.

Q. You knocked him down going down the steps?

A. I never laid the weight of my hand on him.

Q. You were holding him by the pants like you hold these prisoners in the jail.

A. I did not and I never saw anybody else hold him that way.

Q. You let him walk out to the car?

A. Yes, sir. I didn't hold him and I didn't see anybody else hold him.

Q. Where was Ashcraft?

A. Right there with us, right there in the bunch. I had the negro and we all went out together.

Q. What part of the car did he sit in,—Ware?

A. In the back seat.

Q. Who sat in the back seat with him?

A. Ezell sat in the back seat between Ashcraft and the negro.

Q. After you got to the jail where did you park the car?

A. At the jail,—in the alley.

Q. Were the lights on?

A. Yes, sir.

Q. Did Ashcraft see Ware get out of the car?

A. I could not say.

Q. They were both there together and talked to each other?

A. No, sir they did not.

Q. You wouldn't stand for that any way?

A. It didn't happen; I don't know whether I would have stood for it or not.

[fol. 177] Q. Then you brought them both inside the jail?

A. Yes, sir; that is right.

Q. Did you stop down in the lobby of the jail back there at all?

A. Yes, sir. Stopped in the lobby of the jail, all of us I think may be except Mr. Battle, were armed. The rule is no fire arms are taken up in the jail. Left the pistols in the drawer downstairs in the jailor's office.

Q. You didn't take Asheraft and Ware up on the elevator at the same time?

A. Absolutely, yes.

Q. You took them both to your office on the fifth floor of the jail in the room up there?

A. That is right.

Q. Did you tell Ware then you charged him with murder?

A. I did not.

Q. You had already told Mr. Asheraft you charged him?

A. No, sir; not at that time. I said Saturday night at 11 o'clock—I said about 11 o'clock Sunday night Asheraft admitted everything pointed towards him, I talked to him—Saturday night and that is when I accused him.

Q. You already charged him with killing her?

A. Not formally charged him; I told him I believed——

Q. Did you tell John Ware when you took him to the room, you charged Asheraft with killing his wife and he implicated you,—he said you killed her?

[fol. 178] A. I didn't; I wanted to see if he knew Asheraft.

Q. Asheraft made the statement to you?

A. I wanted to see if the negro knew him.

Q. Why didn't you ask John about it at the house?

A. I didn't want to talk to him out there; I wanted to talk to him in my own office.

Q. You wanted a confession from him?

A. I wanted to know if he knew about the killing; if he was implicated in it, I wanted a confession.

Q. You wanted a confession?

A. I wanted to know what he knew about it?

Q. How long were you in there together?

A. I will say the best of my recollection not over five minutes; I may be wrong a little one way or the other; I wasn't watching the clock.

Q. Who did you take out?

A. Ashcraft was taken over to the other room.

Q. And you stayed in there with John?

A. Yes.

Q. Then did you tell John,—you killed this woman?

A. I never told him he killed the woman. He told us.

Q. You told him you wanted him to make a statement to you?

A. I did not. I brought him to the office and asked him if he knew Ashcraft and he said he did. He was asked about riding with him and the negro made the statement he had ridden with him, and Ashcraft made a certain statement [fol. 179] to the negro and the negro turned and said—asked if we wanted to know the truth. We told him we did. Then he turned to Ashcraft and said,—Mr. Johnny, I told you then if this thing——

Q. I will ask you if you and Ware were in the room after Ashcraft was taken over to the other corner room, you and Ware were alone in that room, did you then tell Ware, you killed the woman—or what did you tell him?

A. I told him, tell me all about it; go ahead.

Q. You had nobody in there with him?

A. I believe at that time they may have been others there—in there—in and out, I don't remember.

Q. John Ware had no friends in the room?

A. Didn't have anybody he knew.

Q. He didn't have a lawyer?

A. No, sir; he did not.

Q. He didn't call for a lawyer—you didn't call for a lawyer for him did you?

A. No, sir.

Q. There is a Public Defender in Shelby County?

A. Yes, sir.

Q. He is a paid lawyer paid to advise—paid by Shelby County,—to advise and to take care of indigent people, and his services were at your call, were they not?

A. I imagine so, yes.

Q. Why didn't you call him?

[fol. 180] A. I didn't see any reason to call. There is no law stating I had to call a lawyer for him or friends.

Q. That is your construction of the law.

Gen. Gerber: I want to make an objection to the argument going on between Mr. McCormick and the witness as

to what the law is. Your Honor knows what the law is; I object to that.

Mr. McCormick: He made the statement there was no law.

A. I said I knew of no law that required me to call a lawyer, that is right.

Q. How long have you been a Deputy?

A. About 15 years possibly.

Q. How long have you had that office?

A. Probably 6 years.

Q. You say you talked to John and he gave you a statement about the whole transaction?

A. Yes, sir.

Q. You and he talked there considerable?

A. Yes, sir.

Q. How long a period of time?

A. I imagine Mr. McCormick, it was in the neighborhood of 1 o'clock when we got back to the jail; I am not positive about the time; I was not watching the time. In the neighborhood of 1 o'clock. After he made the statement about [fol. 181] not taking the full blame for anything, I called the Sheriff, and, then we sat down and talked to Ware; and I think Mr. Waldauer came to the jail in the neighborhood of 2 o'clock and that is when he gave the written statement.

Q. You kept talking to him when Waldauer took the statement did you not?

A. Yes, sir.

Q. Mr. Waldauer has on that report the exact time he began to take the statement.

A. Yes, sir.

Q. And Gen. Gerber didn't call him until 2 o'clock?

Gen. Gerber: 1:30 to be exact about it. Why didn't you get it correctly.

Q. How long—Mr. Waldauer began taking the statement how long after he got down here, when he came?

A. I don't know when he got in the building. About all I know is when he got to the fifth floor, in the neighborhood of 2 o'clock, the best I can get at the time.

Q. Do you know whether Mr. Waldauer was called to take the statement of John Ware at all?

A. Yes, sir. He was called down here.

Q. Do you know that he came to take the statement of John Ware?

A. Of John Ware and Asheraft.

Q. Or do you know?

A. No; he came down here. I didn't call him, if that is [fol. 182] what you mean,—I didn't personally call him.

Q. Now during the time you talked to John, did you strike him?

A. I did not.

Q. Or curse him?

A. I did not.

Q. Or mistreat him in any way?

A. I did not.

Q. You have got in the jail what is known as a solitary confinement cell?

A. A padded cell I believe.

Q. The second or third floor, a padded cell where people are put. You put John in there?

A. I did not.

Q. You threatened him with mob violence?

A. I did not.

Q. You didn't put him in the cell and tell him you had better come through?

A. I did not.

Q. Or you would turn the mob loose on him—you didn't tell him that?

A. No; I did not tell him that.

Q. Now then after this confession was secured, the written instrument that you offer here, it simply embodied in writing, and was more or less what the negro formerly—what he had already told you?

[fol. 183] A. Practically the same thing that he had already told us.

Q. And that applies to Asheraft also does it not?

A. Yes, sir.

Q. Now why did you call Dr. McQuiston down here?

A. Got him down here because he was the family physician of Asheraft and knew Asheraft, that is why I called him to examine them.

Q. Physically?

A. Yes, sir; physically.

Q. And you had him to examine Ware at the same time?

A. Yes, sir; had him for the same purpose.
Q. For the same purpose?
A. That is right.
Q. Dr. McQuiston was there you say when this paper was given to Ware to sign?
A. Yes, sir; Dr. McQuiston was there.
Q. Now lets see, when did you take Ware out to the scene of this crime, if you did?

Gen. Gerber: If your Honor please, the only purpose of having the jury out at this time, is to determine whether or not the statement was freely and voluntarily made without hope of reward or promise of immunity, and I ask it be limited to that phase.

The Court: Gen. Gerber is correct about that. Lets confine it to whether or not the confession was freely and voluntarily made Mr. McCormick. I understood him to ask Mr. Becker when he took him out to the slough. If [fol. 184] you are trying to show that he was taken out there before the signing and the confession, all right otherwise it is not admissable.

Mr. McCormick: I just asked when he took him out there. If he took him out there any time during the examination, I am entitled to know that.

Mr. Becker: I took him out there the Tuesday morning after the confession Monday.

The Court: Out there on the Tuesday morning following the Monday morning.

Q. The day the confession was made, what day or what night?
A. He was brought in Sunday the 15th. That was early Monday morning evidently.

The Court: What Mr. McCormick wanted to know is whether you took him out there before he made the alleged confession; or after he made the confession.

Mr. McCormick: That is all I want.

Mr. Bickers: I want the record to show and you instruct the jury not to consider anything that was said by Ashcraft from early 7 o'clock Saturday night when brought to the jail and carried to the fifth floor, until 7 o'clock Monday morning; no part of the statement he might have made, orally or written, is legal as ruled in his case and part of the record in this case.

The Court: As to Ashcraft's confession that is out. It is not necessary to instruct the jury about his confession; I am not going to admit it.

[fol. 185] Mr. Bickers: I would like for the Court to rule on it now and note an exception.

The Court: I overrule it.

Mr. Bickers: You over rule it?

The Court: Yes, sir.

Mr. Bickers: Note an exception.

The Court: I will allow a recess of five minutes.

(Court here recessed for five minutes)

Mr. McCormick: If your Honor please, when the jury went out, I don't know whether I made an objection or not—the objection was to the introducing of testimony on the part of Mr. Becker with reference to the defendant, Ware connected with the crime, on the ground that any statement of Ware's to him was not a free and voluntary statement. That is what we are hearing now—as well as any statement that Mr. Becker was testifying to that Ware made at any time. Either what Ashcraft said to Becker or in anywise involving Ware, on the ground that any statements that Ware made, were not free and voluntary statements. That Ashcraft's statements to Mr. Becker were not free and voluntary. We have heard Mr. Becker and I want to put Ware [fol. 186] on that stand for a questioning.

The Court: There is one question I want to ask Mr. Becker if you have no objection.

By the Court:

Q. Mr. Becker, how long had the defendant Ware been in your custody after arrival at the jail when he made the statement to this effect:—"Now look here Mr. Johnny, I told you in the beginning if anything came up with this I was not going to take the full blame."

Mr. Becker: I would say about five minutes. Just time enough to be brought upstairs on the elevator and taken to the office and the conversation taking place.

The Court: That is all.

(The witness George Becker was here excused and the defendant, John Ware took the stand.)

JOHN WARE, one of the defendants, being first duly sworn by the Court and testified, in the absence of the jury, as follows:

Direct Examination,

By Mr. McCormick.

Q. John, do you remember the occasion of the officers coming to your house on Sunday night or early Monday morning?

A. I sure do.

Q. Where were you,—in bed?

A. Yes, sir.

Q. Who came to the room?

[fol. 187] A. Well, I don't know.

Q. Not the names, but how many men came in?

A. Mr. Becker, Mr. Asheraft, Mr. Jayroe and Mr. Key, I think.

Q. What did they tell you?

A. Asked me to get up and dress and I did so.

Q. Then what happened?

A. I was hand-cuffed in the room and marched out to the steps and the steps is built like this (Indicating) and when coming off the bottom step I was struck, by whom I don't know.

Q. A hard or a light tap?

A. It was hard.

Q. Did they tell you what they were arresting you for?

A. No, sir; they did not.

Q. You got in the car and came on to the jail, is that right?

A. Yes, sir; I asked what for and they said I would find out.

Q. When you got to the jail who got out first, if you know?

A. I don't know.

Q. You sat in the back seat of the car?

A. I did.

Q. When you got in the jail where were you taken first, if any place?

A. Up on the fifth floor of this building.

Q. Was Mr. Asheraft taken up with you?

A. Yes, sir; he was on the same elevator.

Q. On the same elevator?

A. Yes, sir.

[fol. 188] Q. In what room were you taken?

A. Not taken to no room right at the present. We all got off of the elevator. I was still hand-cuffed. Later after we got to the fifth floor I don't know who took them off. I was asked did I know Mr. Asheraft.

Q. When you got off the elevator at the fifth floor?

A. Yes, sir.

Q. This room on the northwest corner?

A. Right over here. (Indicating.)

Q. You were taken directly to the room?

A. Yes, sir.

The Court: Mr. Bickers, I don't want you to leave the room.

Mr. Bickers: All right.

Q. When you were taken immediately into that room?

A. Yes, sir. Right after the question was asked—the question was asked out there—I didn't know him by Mr. Asheraft; I knew him as "Mr. Johnny, that is all.

Q. That was out in the hall?

A. Yes, sir. Out in the hall between the elevator and the little room.

Q. Before you got into the little room?

A. Yes, sir.

Q. What did you say when they asked you if you knew the man's name?

A. I tried to study a while—been a good while since I saw him, and I told them where I knew him at and I told them I rode with him from the job. As far as anything [fol. 189] else, I didn't know.

Q. Where were you then taken?

A. In the room over here.

Q. And Asheraft was taken in there with you?

A. No, sir.

Q. You were taken in there alone?

A. Taken in there with Mr. Becker, this man here I think was Mr. Bob Ezell; that is who it was, Mr. Ezell?

Q. Mr. Bob Ezell?

A. Yes, sir; I didn't know his name; I learned it since; learned all the names.

Q. When you got in there what was said?

A. Mr. Becker asked why I wanted to kill this man's wife; I said I hadn't killed his wife; I didn't know he had a wife that is the truth now, I told him I didn't know it.

He sat down there and he said, sit down there. And he asked me about killing the woman and I told him I didn't do it; and he questioned there a while and I was talking to him in there and this man Mr. Ezell, he asked me the question and I told him the same thing I told Mr. Becker, I didn't do it, then I was taken from that room.

Q. Before you get away from that, what kind of bad language was used, the words.

A. I don't want to express it unless you tell me to.

The Court: Go ahead.

A. Mr. Becker told me you are telling a God damned lie; [fol. 190] you know you did. Just as well tell the truth; we are going to get it. I told him I didn't know what he was talking about and not to put a rap on me; I didn't know about Mr. Johnny's affairs at all; that I only rode from out there in with him, from work. And I was taken out of the room and placed on the elevator and carried down, I don't know how many floors, and placed in a box, and then taken out of the box later, I don't know when.

Q. What kind of a box are you talking about.

A. A little old steel box.

Q. A padded cell?

A. I ain't seed no pads.

Q. Describe it to us?

A. It is about as wide as from here to that chair. I laid down and it wasn't wide enough for me to stretch out when I would lay down.

Q. Could you stand up?

A. No, sir.

Q. Was it dark in there?

A. No, sir; wasn't dark, from the light shining out on the window.

Q. What time of night was this?

A. I don't know.

Q. What did they say they put you in there for?

A. I don't know; they didn't tell me what for.

Q. Did they come down and get you out of there?

[fol. 191] A. Yes, sir.

Q. What did they say to you then?

A. When they taken me out of there they put me back on the elevator and brought me back to the fifth floor. Before I reached the fifth floor, Mr. Jyaroe and Mr. Ezell told me I better tell the man here, Mr. Becker, I did the

crime; if I didn't they were going to take me out to a mob, and going to turn me over to the mob.

Q. Turn you over to a mob?

A. Yes, sir.

Q. What did you say then?

A. I told him I hadn't did no crime—I hadn't any doubt about that they knew I hadn't did nothing.

Q. Did you agree to make a statement to them?

A. After I got back, Mr. Becker hit me up there in the room—up there, and I told him;—I said, what you want me to do. He said we want you to say you killed the woman. I said, if I say that you won't let the mob have me? He said no. I told him I did not, that is all I told him; anything else, I don't know.

Q. They told you they would keep the mob off and not let them hurt you any more, that you were admitting you killed her?

A. Yes, sir.

Q. And you did admit then you did?

A. Yes, sir; I did.

[fol. 192] Q. How about the long statement Mr. Waldauer came up—somebody came up later on?

A. Yes, sir; a man come up there; I learned later like I did *thi* their names,—that was Mr. Waldauer.

Q. Did you know about the cell in the jail house until you were put down there?

A. I was never in jail before—I been in jail before but not this one.

Q. That is the reason you made the admission?

A. Absolutely.

Q. Did you kill the woman?

A. No, sir; I did not.

Q. Did you know about it?

A. No, sir. Never saw her in my life. I rode with him. If I was going home and he passed by me and asked me if I wanted to ride; and I rode with him. So far as knowing about the home, I don't know and Mr. Becker knows it. Mr. Becker knows by me being a nigger that he could bring Mr. Ashcraft to—by me being a nigger, and he is sitting there now and knows the testimony of things he says here against me in the witness chair, are not true. I am going to tell the truth if I get shot, no difference what happens to me at all I want to say your Honor.

Cross-examination.

By Gen. Gerber:

Q. You say you have been in other jails?
[fol. 193] A. Yes, sir; Brownsville.
Q. Ever been in jail in Clarksdale?
A. No, sir.

Gen. Gerber: That is all, your Honor.

(Witness excused.)

GEORGE BECKER, the said witness, here resumes the stand and testified further as follows:

Redirect examination.

By Gen. Gerber:

A. Mr. Becker, I will ask you if from the time you brought Ware up to the fifth floor, when he confronted Mr. Ashcraft, when they had the colloquy between them, whether he left the floor and went downstairs?

A. Not until early Monday morning, not until the statement was transcribed and read to him around 6 o'clock in the morning.

Q. Did anybody in your presence, did anybody threaten the negro with turning him over to a mob or threaten violence of any kind or make such a statement to him?

A. They did not.

Q. I will ask you if anybody at any time took him down to another floor and put him in a cell such as he talked about?

A. No, sir.

Q. He never left your presence any time until after he made the statement?

A. He was on the fifth floor the whole time from the time [fol. 194] Ware was brought in there until the statement was read to him. Then he was turned over to the jailer,—where he put him, I don't know.

Q. Were any handcuffs placed on him at his house?

A. No, sir.

(Witness excused.)

HENRY WALDAUER, a witness introduced in behalf of the State, after being first duly sworn by the Court and in the absence of the jury, testified as follows:

Direct examination.

By Gen. Gerber:

Q. State your name to the Court?
A. My name is Henry Waldauer.
Q. Mr. Waldauer, you are a Court Reporter?
A. Yes, I am.
Q. You have been a Court Reporter for how long?
A. 24 years.
Q. You are a free lance Court Reporter and you work for any lawyer who wants to hire you to take testimony in court?
A. I do.
Q. I will ask you if in addition to being a Court Reporter, you report before any other investigating body?
A. Yes, sir. Before the United States Senate, the House of Representatives, the Railroad Utilities Commission at Nashville.
Q. Mr. Waldauer I will ask you if on June 16th, early morning of June 16th, 1941, whether you held any office [fol. 195] of any kind in the city of Memphis?
A. I did not.
Q. Did you have occasion on the early morning of June 16th—did you have occasion to come to the jail?
A. I did.
Q. Who requested you to come here?
A. Yourself.
Q. Do you remember what time I called you?
A. I made a memorandum of it at the time,—something after 1 a. m.
Q. And I will ask you if you immediately came here?
A. Yes; I did.
Q. Mr. Waldauer, I will ask you if on that particular occasion, after you got here, you took a statement from the defendant in this case, John, alias, Tom Ware?
A. Yes; I did.
Q. Where was that statement taken?
A. On the fifth floor of this building, northwest corner.
Q. I will ask you whether the statement you took was in question and answer form,—verbatim?

A. Yes, sir; it was.

Q. Mr. Waldauer, at the time you took this statement, I will ask you to state to the Court whether anybody cursed or abused the defendant Ware?

A. No, sir; no one did.

Q. I will ask you if at that time anybody offered him [fol. 196] any insults of any kind or beat, struck or abused him?

A. No, sir.

Q. I will ask you if at that time he was forced to make any kind of statement?

A. No, sir; he was not.

Q. On the contrary, I will ask you if the statement made at that time to you was free and voluntary?

A. Yes, sir; it was.

Q. I will ask you whether there were any promises of immunity or hope of reward held out to him?

A. There were not.

Q. You took the statement Mr. Waldauer; who was present there other than yourself?

A. Mr. George Becker was there and Assistant Attorney General Preston Battle.

Q. And I will ask you whether the questions were asked by Mr. Becker and whether the answers were made by the defendant at that time?

A. Yes, sir.

Q. Tell the Court how you took the colloquy, whether in shorthand or not?

A. Yes, sir; I took it in shorthand.

Q. After you finished taking the statement, whether you transcribed it on the typewriter?

A. Yes, sir; I did.

[fol. 197] Q. I show you an instrument and I will ask you whether that is the instrument you typed on the early Monday morning of June 16th, 1941?

A. Yes, sir; it is.

Q. I want to ask you to state to the Court who made the answers and every word and sentence of the answers contained in the statement of John Ware you hold in your hand?

A. Every answer in the statement was made by John Ware, himself.

Q. I will ask you whether you or anyone at that time, added to or took anything from any answer?

A. No, sir; absolutely not.

Q. And after you transcribed the statement, I want to ask you whether it was read back to him?

A. Yes, sir; it was.

Q. Do you remember who was there when it was read back to him, Mr. Waldauer?

A. Yes, sir. There in the room at the time it was read back, at 5:40 a.m., was Mr. Battle, Mr. Bob Ezell, Mr. George Becker, Dr. McQuiston, Sheriff Joyner and myself.

Q. I will ask you at the time, before the statement was read back to the defendant Ware, if he was furnished with a copy of that statement?

[fol. 198] A. I made an original and four copies. Every one in the room at the time had one, in order to make certain it was read back correctly.

Q. Was the defendant Ware at the time asked whether he could read and write?

A. He was.

Q. What did he say?

A. He could not read.

At the conclusion the defendant Ware said that was the way it was.

Q. I am asking you whether anyone asked him whether he could read and write; do you remember?

A. I remember after it was read back, he was asked to sign and he said he could not write, that he could make his mark.

Q. You say Dr. McQuiston was there and followed the reading of the statement; who read it?

A. Mr. Preston Battle.

Q. After the statement was read back I will ask you whether or not you talked to the defendant Ware with reference to the execution of the statement?

A. Yes, sir; I did.

Q. Tell the Court what happened about that?

A. You mean at the time he signed it?

Q. Yes; immediately after the statement was read, what he said about the signing of that paper?

A. He said that was the way it was. Mr. Battle said, [fol. 199] that is what happened, Ware. He said that is what happened; that is the way it was." Mr. Battle said "this gentleman is a Notary Public and we want you to sign the statement and swear to it before him." Ware

says, "I don't know how to write, I can make my mark." Mr. Battle said: "all right, he will write your name for you and you touch the pen. I signed his name and he touched the pen and made his mark and swore to the statement before me.

Q. I will ask you if at that particular time Dr. McQuiston made an examination of him?

A. Yes, sir. In the same room. He took off all his wearing apparel, he was nude.

Q. Dr. McQuiston looked him over?

A. Yes, sir.

Gen. Gerber: Take the witness.

Cross-examination.

By Mr. McCormick:

Q. Do you have any interest in the matter, one way or the other?

A. Absolutely not.

Q. You were called by Gen. Gerber at your home on this morning at 1:30 o'clock?

A. Yes, sir.

Q. Gen. Gerber told you to come to the jail, that Mr. Ashcraft was about to make a confession?

[fol. 200] A. Yes, sir.

Q. And you came?

A. Yes, sir.

Q. You arrived at 2:10 o'clock or about that time?

A. Yes, sir.

Q. You saw Gen. Gerber when you got here?

A. Yes, sir.

Q. And you talked with him a little while, I assume?

A. Yes, sir.

Q. He told you that he didn't want you to take the statement of Ashcraft but he wanted you to take the statement from John Ware?

A. Yes, sir; I took Ware's statement first.

Q. And you did go up to the fifth floor of the jail?

A. Yes, sir.

Q. And took the statement?

A. Yes, sir.

Q. You began to take the statement about 2:10, did you not?

A. 2:10, yes, sir.

Q. It was around 5 or 6 o'clock in the morning when you finished transcribing it and presented it to Ware for his signing?

A. Yes, sir.

Q. Now there was nobody there representing Ware?

A. No, sir; there was not.

Q. Mr. Battle was there representing the State as Assist-
[fol. 201] ant to Gen. Gerber?

A. Yes, sir.

Q. Ware had no friends there, did he?

A. No, sir.

Q. Then, when you finished with John Ware, you went to take the statement of Ashcraft?

A. Yes, sir.

Q. And did take it?

A. Yes, sir.

Mr. McCormick: That is all.

(Witness Excused.)

Gen. Gerber: I now offer the statement in evidence.

MOTION TO RULE OUT CONFESSIONS

Mr. McCormick: I make the motion that the testimony as to the so-called confession of John Ware, either orally or written, be not permitted to go to the jury, upon the ground that it is not shown to be the free, voluntary confession, first. Second, that it appears in the record that John Ware was held there incommunicado, without any friends or without the aid of counsel, and the statement was taken from him without the aid or advice of counsel; and again, it is my motion that the taking of Ashcraft's so-called confession, either written or oral——

Gen. Gerber: We are not offering any confession of Ashcraft.

Mr. McCormick: I am making my motion now—upon the
[fol. 202] ground that the confession—so-called—and the admissions—so-called—against Ashcraft and Ware, both are one, the same transaction, were taken in the same manner and under the same circumstances and in the same room and the same quarters in the jail. Just one and the same transaction, taken by the same Notary Public, the same

stenographer and the same witnesses. That it was a continuous operation. And that the Supreme Court of the United States has held invalid and inadmissible, both confessions for all intents and purposes and that the Supreme Court of our own state and the opinion of the Supreme Court of the United States, to the effect that Ware's confession is inadmissible to be used in this Court again. I therefore move the confessions be ruled out as inadmissible for any purpose. Also the Supreme Court of Tennessee, in its mandate sending this case to this Court, stated—the Supreme Court of Tennessee had this to say, in the mandate sending it back to this Court: "Asheraft and Ware were jointly tried and convicted on the theory that Asheraft hired Ware to perform the murder." This opinion of the Supreme Court of the United States. Our Supreme Court of Tennessee said this: "Both the defendants Asheraft and Ware were convicted of murder in the first degree on the person of Mrs. Asheraft, wife of the defendant, Asheraft. There were certain alleged confessions submitted on the trial of the case. Following the convictions of both defend- [fol. 203] ants, there was an appeal to the Court and the convictions as to both defendants were affirmed, this Court holding the alleged confessions were properly submitted, and subsequent reviews of the convictions by the Supreme Court of the United States, resulting in a reversal of the judgment of this Court,—that Court holding that the alleged confessions were illegally obtained and were not therefore admissible in evidence." That the instructions of the mandate of the Supreme Court of Tennessee, on the remand by the Supreme Court of the United States in that language, our Supreme Court of this state has held that Ware's confession was an inadmissible confession, and on this ground I move the Court now it is not admissible for any purpose.

The Court: Mr. McCormick, do you have a copy of the United States Supreme Court's opinion?

Mr. McCormick: Yes, sir.

The Court: Read what that Court says about the confession of Ware.

Mr. McCormick: About Ware?

The Court: Yes, sir.

Mr. McCormick: Having passed it back to the Supreme Court of Tennessee, after vacating the judgment of the

Supreme Court of Tennessee, passed it—and, to give you the exact language—"Second, as to Ware, Ashcraft and Ware were jointly tried and convicted——

The Court: Read what it says with regard to the confession of Ware.

[fol. 204] Mr. McCormick: All right. I was reading it, the very next sentence.

The Court: Go ahead.

Mr. McCormick: "that Ashcraft and Ware were jointly tried and convicted on the theory that Ashcraft hired Ware to perform the murder."

After argument on the part of counsel for the defendant Ware, counsel for defendant Ashcraft said:

Mr. Bickers: I want to join in the motions of Mr. McCormick.

Thereupon, The Court, passing on the motions of counsel for the defendants, said:

DECISION OF THE COURT ON THE MOTIONS

The Court: Addressing myself to the question raised by the opinion. It is obvious that the United States Supreme Court, by express language, did not pass on the question of the admissibility of Ware's confession. Of course I am sitting here, an inferior court to all three Courts involved. Now the opinion of the State Supreme Court accompanying the Procedendo which was sent back here, plainly shows that it just reversed the case and sent it back. It did not pass upon Ware's confession. I think the use of the word, "confessions" is a typographical error. The opinion shows, addressing itself to the confession of Ashcraft, that the Supreme Court of Tennessee stated "After all, the sufficiency of evidence against the defendant Ashcraft, with his confession elided as required by the judgment of the Supreme Court of the United States, is a question which should be passed upon in the first instance by a trial jury."

The opinion further plainly states that the responsibility as to whether another trial should be had rests upon the District Attorney General, and it is obvious to all by what we are witnessing here today that the District Attorney General is of the opinion that the evidence warrants another [fol. 205] trial.

As I see it the question as to the admissability of the defendant Ware's confession, is a matter to be passed upon by the Court at this trial.

And now, as a preliminary question of fact, to be determined by me, as the trial Court, as to the admissibility of the confession of Ware in evidence, I find that the confession of the defendant Ware was freely and voluntarily made; and that the same was uninfluenced by any hope or offer of reward, and that no violence was used; and no promise or offer of immunity was made. So, it is the opinion of the Court that the matter should go to the jury. Of course, the finding of the Court on the matter just stated, is not binding on the jury; as a matter of fact the testimony must be passed upon by the jury; but, as a preliminary question of fact as to the admissibility of the confession in evidence that address itself to the Court, I do find it was freely and voluntarily made. Of course, the jury will be properly instructed as to the law relative to the confession being considered.

Mr. McCormick: Note our exceptions if it please the Court.

The Court: Is there anything further?

Gen. Gerber: No, sir.

Mr. Gerber: We are ready, if the Court please.

The Court: Bring in the jury.

The Jury here returned to the jury box and in the presence of the jury, the following proceedings were had:

[fol. 206] George A. Becker, the said witness, again resumed the stand and was examined as follows:

By Gen. Gerber:

Q. I believe when the jury retired, you said you had been out to Ware's house and picked up Ware and came down to the jail, and you had reached the fifth floor with both defendants. State to the Court and jury what happened when you got up to the fifth floor at that particular time and what colloquy, if any, occurred between the defendant Ware and defendant Asheraft after you got up on the fifth floor—to the office on the fifth floor, the homicide office.

A. The negro was asked if he knew the white man and he said he did; that his name was Johnnie Asheraft; that he worked with him on the Bowling alley job and he was

asked if he ever rode in the car with him and the negro said he had, and he was asked when was the last time he rode with him, and the negro hesitated and—Asheraft said——

Q. Don't state anything Asheraft said—you say he hesitated?

A. Yes, sir; the negro hesitated, and Asheraft made a statement and the negro turned to me and said, "Boss you all want the truth, and we told him that was all we wanted. And he turned back to Mr. Asheraft, and said;—Mr. Johnnie, I told you if anything ever came of this I was not going to take the full blame. And Mr. Asheraft was taken out of the room, taken to the theft squad office on the other side [fol. 207] of the building. Then we started talking to Ware and he made the statement to us, and told us how——

Q. I want to ask you at this time, you say you brought the man up and there was a colloquy between the defendants Ware and Asheraft. Tell how long it was after he was brought to the jail before that took place.

A. I would say, in my opinion, about five minutes.

Q. How long was it after the defendant Asheraft was taken to the theft squad office, before the defendant Ware made his statement to you admitting his participation in the crime?

A. As soon as Asheraft was taken out of the office, we told Ware to go ahead and tell what happened, and then he made the statement to us.

Q. I will ask you if, at that time, he made the statement to you?

A. He did.

Q. Was it freely and voluntarily made?

A. It was.

Q. I will ask you whether any force or violence was practiced on him at that time?

A. There was not.

Q. Or whether you or anyone, struck him or abused him in any way?

A. We did not.

Q. Did you strike him or do anything to him?

A. We did not.

[fol. 208] Q. Was there any hope of reward or any promise of immunity held out to him for making the statement?

A. There was not.

Q. State to the jury what he told you then?

A. He first told us he knew Mr. Asheraft on the bowling alley job near Sears-Roebuck Co. and that one day it was raining and he didn't have any car fare and asked if he could ride with him and he said he could.

Mr. McCormick: I object to the recital of what transpired when Mr. Becker stated it was in writing, signed, sealed, delivered and sworn to before a Notary Public.

Gen. Gerber: If the Court please, I insist the State has the right to put the proof on and let the jury know what occurred and how it occurred and we insist the witness be permitted to tell what happened.

The Court: The objection is overruled Mr. McCormick. However, gentlemen of the jury, I will say to you at this time, no statement that the defendant Tom Ware made against the defendant Asheraft, is competent against Asheraft unless the defendant Asheraft was present at the time. Have I correctly stated it?

Gen. Gerber: Your Honor ought to go a step further and tell the jury they are not to consider anything against the defendant Asheraft that the defendant Ware states.

The Court: That is substantially what I told him; you are not to consider anything against the defendant Asheraft [fol. 209] that the defendant Ware said, either orally or in writing.

Q. Go ahead Mr. Becker.

A. He told us that one day it was raining and he didn't have any car fare and he asked Mr. Asheraft which way he went, if he went by Chelsea and he told him he did, and Asheraft told him that he came by that way every day, and would pick up the negro and he said he could ride with him. And he propositioned him about killing the woman. Ware said he didn't want to do it. After a while he quit the bowling alley job and went to work for a concrete concern on Chelsea, and Wednesday night or late Wednesday afternoon, he was walking home from work from the concrete plant, and Mr. Asheraft came along in his car and picked him up, and he renewed the proposition and told him it would have to be done that night. About 2 o'clock Thursday morning, that Asheraft came to the negro's house and the negro said at that time there was nobody home but him and Mr. Asheraft came to his house, and he got in the car and they drove first to the slough, and then drove

back to the house and parked the car at the driveway; and the negro waited on the outside for sometime and finally Ashcraft came out with a suit case and a blanket and told the negro the woman would be out in a little while. Then they both came out of the house and when they did the negro got up and told them it was a hold-up. And Mrs. Ashcraft started to scream, and Ashcraft told her to shut up, there was two of them, do you want to get us both [fol. 210] killed? The negro then got on the back seat of the car and asked Mrs. Ashcraft if she could drive. And he said she was driving, and they drove out to the place in the road. When they got to the place Mr. Ashcraft touched the negro's knee and they stopped and got out of the car and Mrs. Ashcraft waslked in front and Ashcraft and the negro behind, and they got part of the way down to the slough and Ashcraft told the negro to get her wrist watch, and he got it and brought it back to Ashcraft and give it to him, and they walked on down to the pool and when they got down there the negro pushed her in the water, and had to get Ashcraft help to do it, and when she got in the water she started to scream, and Ashcraft told him they couldn't have that yelling, and he picked up a rock and gave it to the negro and told him to hit her in the head. He said he took a step towards the pool and hit her; and Ashcraft picked up another rock and told him to hit her in the head, and after that they walked back to the car, and Ashcraft told the negro to empty the purse so it would look like robbery, and that is as far as we got.

Q. You state to the jury that is the oral statement he made. Did Mr. Waldauer, the Court Reporter come to the jail about that time to take the statement of Ware?

A. About 2 o'clock Mr. Waldauer came here to the jail.

Q. State whether or not at the time Mr. Waldauer was [fol. 211] there, questions were asked Ware and answers made by him?

A. Yes, sir.

Q. I will ask you was it all taken down there in shorthand or how?

A. Yes, sir in shorthand.

Q. And was the statement later transcribed on the typewriter?

A. Yes, sir. He came from the fifth floor to the front office downstairs and used the typewriter.

Q. After the statement was made to Mr. Waldauer, he transcribed it on the typewriter, then was that statement read back to the defendant Ware?

A. Yes, sir, read back to Ware in the presence of Mr. Battle, Sheriff Joyner, Bob Ezell, Dr. McQuiston and myself.

Q. Who is Dr. McQuiston?

A. Mr. Ashcraft's physician.

Q. And I will ask you if he was present when it was read back to the defendant Ware?

A. Yes, sir; he was present.

Q. I will ask you whether he had a copy of the statement at that time?

A. Yes, sir; everybody there had a copy. The defendant Ware was offered a copy and he said that he could not read, and Mr. Battle read the statement to him and he was asked to sign the statement and he said he could not write; and Mr. Waldauer had him to make his mark, and he [fol. 212] then swore him to the statement at that time.

Q. Mr. Waldauer handled that himself?

A. Yes, sir.

Q. I hand you a paper writing and asked you to state whether or not that is the statement taken from Ware and transcribed by Mr. Waldauer, the court reporter, at that time?

A. Yes, sir. That is the statement.

Gen. Gerber: I now offer that statement in evidence as Exhibit "M" and ask permission to read it to the jury.

The Court: Gentlemen of the Jury, I charge you again that this statement is only admissable against the defendant John Ware. It is not competent against the defendant Ashcraft and you should not consider it against Ashcraft for any purpose.

Q. I want to ask you this question, whether in any of the answers made by the defendant Ware as reported in the written statement given to Mr. Waldauer, anybody interpolated anything?

A. No, sir; just like he gave it, Mr. Waldauer copied it.

Q. Were there any suggestions or words supplied in the statement he made at the time?

A. No, sir; there were not.

The statement as offered in evidence as Exhibit "M," was here read to the jury by General Rond in words and figures as follows:

[fol. 213] EXHIBIT "M"

Statement of John Ware, Alias Tom Ware, Age 20, Residence Oriole Street, Works at Mid-South Pipe Company, Memphis, Tennessee, charged with the murder of Mrs. Zelma Ida Asheraft on Thursday, June 5, 1941, made at the County Jail to Deputy Sheriff George A. Becker, in the presence of Assistant Attorney General Preston Battle; Henry S. Waldauer, court reporter.

Questions by Mr. Becker:

Q. Now, Tom——
A. Yes, sir.
Q. You are in jail, charged with the murder of a white woman by the name of Zelma Ida Asheraft on the early morning of June 5, 1941; and it is my duty as an officer to tell you that any statement you might make to me about this murder must be freely and voluntarily made, and it can and will be used in court against you. Knowing that, are you willing to give me a truthful statement about how you killed this woman? Are you?
A. Yes, sir. I have already done it now.
Q. You say you already done it?
A. Yes, sir.
Q. Did you kill Mrs. Asheraft?
A. Me?
Q. Yes.
A. Yes, sir.
Q. What did you kill her with?
A. A rock.
Q. In your own way, I want you to go ahead and tell all that you know about this killing.
A. Well, the nearest time I knowed him was in—I can't get the month. Let me see. This is June?
Q. Yes, this is June.
A. What comes before June?

Mr. Battle: May.

A. Well April. It was about the 15th of April.
Q. Of this year?

A. Yes, sir; when I knowed him.

[fol. 214] Q. What was Mr. Asheraft doing at the time, and what were you doing, and where were you working?

A. At the time we were over here by Sears & Roebuck, we were on a pile driver. He was operating the pile driver, and I was working on the pile driver as a laborer. Well, I started to riding with him. Do you want me to tell you how I started to riding with him?

Q. Yes.

A. One evening I did not have no street car fare, and I was over at Sears Roebuck, and I asked him, "Which way do you go, boss", and he said, "I go over to Chelsea", and I asked him would he let me go with him, and he said yes, and I go over with him, and he said, "I come through here every morning, and I can pick you up on Chelsea", and he began to pick me up that way; and about the second morning after I was riding with him, he asked me about this conversation, he told me about a boy who was a friend of his, and his wife was gone to California to take a trip, and this friend of his had a woman, outside woman—I will tell you like he told me—he had an outside woman, and his wife was coming home, and he wanted to get rid of this woman, because he had tried to make her leave and she would not, and this fellow was giving him $100.00, and he was going to get somebody—he did not have nerve enough to do it, and he was going to get some help on it, and he talked to me, and I did not turn him no answer until the fifth or sixth time after he had put the question to me.

Q. What was that question, Tom? That is what I want you to tell me.

A. He asked me did I have nerve enough to help him do the job.

Q. Do the job?

A. That is right; that is what he told me; he said "job". That is what he said to me. He asked me did I have nerve enough to help him do the job. I am telling it like he told me. I knew what he meant by the "job". He asked me did I have nerve enough to kill this woman, but he said "job", and I am telling it like I got it from him.

[fol. 215] Q. That is what I want.

Mr. Battle: That is all we want, just what happened.

Q. Go ahead.

A. I told him I did not want to do it, and I am telling it

to you just like it was, and he said "this job". When he first asked me to do it, I never told him I would, and then later on I told him that I would. He said for me at first to call him out, like I wanted to buy a stove like he had, and I was going to sit on the porch in front, and he was going to call the woman out, and then when they go out there, for me to act like it was a hold-up, and get them both in the automobile, and to do the job that way, and after he told me about it,—I was to quit work on the job and to get another job another place, and then I was to get in touch with him. Now that was during the month of April, I don't remember what day it was, but that is when he was telling me what he wanted done.

Q. Now when did it happen? Look up there at the calendar, and see if you can tell me the day it happened.

A. What day it happened? Let me see. The day of the month?

Q. Yes.

A. Let me see. Today is Sunday. It was the week beginning the first of June. You want me to tell you what day it was. It was the 5th—yes, that is right—it was on the 5th that I killed the woman.

Q. Go ahead.

A. After the job was done——

Q. Wait a minute. Tell about the day before you did the job, when you met him.

A. The day he met me on the street, he taken me on to Oriole Street in his automobile, and he stopped, and he sits down and tells me to hold up my head and don't be looking downhearted, like I am scared, because it is nothing [fol. 216] to be done—I am telling it like — was—he says it will be now, and if you don't see me any more, he says it will be done then. I rode on out to the drug store, and got out of the automobile.

Q. What drug store did you get out?

A. The colored drug store on Chelsea, and then he came back to my house on Oriole Street the following night at 8 o'clock sharp, and he asks me to get in the car, and he takes me out to his place, he says me and him will spot the place, and then we comes back and he puts me out of the automobile, and we sits up on the bridge there on Chelsea and Oriole.

Q. You did what?

A. Gets out of the car, and we were on the bridge there on Chelsea and Oriole.

Q. Who was that? You say "we".

A. Who is that?

Q. Yes.

A. Johnny Ashcraft. He was driving the car.

Q. Then what did you do?

A. I sat on the bridge on Chelsea and Oriole, I sat there 15 minutes, and I gets off of the bridge, and walks down the road two or three times, and then I goes home. I had sat there on the bridge for 15 minutes, and then I gets up and goes to bed. Wednesday night at 1 o'clock he comes to my house and knocks on my door.

Q. You say "he". Give us the name of the person who came to your house.

A. Johnny Ashcraft. He gets me up. He comes there to get me to go ahead. He eases in the house and leaves his car parked, and there is a little dog that keeps barking, and he comes out and scolds at the dog.

Q. Was the dog barking at your house?

A. Sir?

Q. Was the dog barking at your house?

A. No, at his house.

[fol. 217] Q. You haven't left your house yet. He came to your house in the car.

A. Yes, sir; he came there in the car, and I got up, and I went out of the back door, and got in the automobile with him, and he drives to his home, and he drives in the driveway, and cuts the lights off, and gets out. I got out of the car on the outside, and he goes in the back, and I stays there, and I stays there about two hours, or three, I just stays there, and he has been in the house, and he comes out of the door and tells me that she will be ready in a few minutes.

Q. He came out and told you. Who did?

A. Johnny Ashcraft comes out, and he tells me that she will be ready in 15 or 20 minutes, and first he brings out a black hat in a paper bag. Next he brings out a grip, and puts the grip in the car, and then he goes back, and Johnny Ashcraft tells me, he says, "all right, now, she will be out in 15 minutes, and don't do any dribbling at it", and he goes back in the house, and comes back again, and him and her comes out, and I eases around the car and grabs her, and she hollers, and Johnny Ashcraft tells her, he said,

"Don't holler; it is two of them, don't holler, it is two of them," and I tells him to get in the car, and her too, and he asked her, "Will you drive", and she said, "yes, I will drive", and she gets in the car, and he got in the car, and he said, "I haven't got any money", and he asked her if she had any money, and she said, "yes," and she said she had $50.00, and she gave me $50.00; and so we goes on out Chelsea and on out Jackson—I don't know all the streets out there, and I gets to the spot out there, and I have them to stop the car, and when the car is stopped, he gets out of the car, and she gets out of the car, and walks down the little dirt road, and he comes to me and tells me to make her take off the wrist watch, that he might want that. She takes it off, and I takes the wrist watch and I slips it to him, and I tells the woman that I was going to put her in the river first, and then her husband, both of them, and she screams and hollers, and he grabs her and says "let her have it", and I let her have it.

[fol. 218] Q. Who grabbed her?

A. Johnny Asheraft.

Q. You let her have it. What do you mean?

A. I hit her.

Q. With what, and where did you *get* it?

A. A rock.

Q. Where did you get the rock?

A. The rock was laying down there, a white rock. It was already down there, and after I hit her—I don't know how many times it was.

Q. Where was she when you hit her?

A. In the water.

Q. What did you do with the rock?

A. Put it in the water too.

Q. Did you throw the rock at her, or hold it in your hand?

A. Turned it aloose.

Q. I mean as you hit her?

A. Sir?

Q. While you were hitting her in the head did you hold the rock in your hand?

A. No, sir; turned the rock aloose; threw it and hit her.

Q. You threw it and hit her?

A. Yes sir.

Q. How many times did you throw it at her and hit her?

A. I hit her with two rocks.

Q. How big a rock?

A. I don't know what size it was, and then he says, "That will do", and then he says, "Let's get away from here", and he says, "Everything is all right, and I owe you $50.00, and I am going to the bank and draw the $50.00 in a day or two, if no one comes up; I am getting out of the way", and that is the last word he tells me, and we leave; that is, I don't see him no more.

[fol. 219] Q. After that, after you had killed the woman, what happened then?

A. He tells me to take the pocket book, to take everything out of it, and to drop the pocket book down, and go away.

Q. What did you do then?

A. He said, "That makes them think it is a hold-up; it makes them think somebody was held-up, and we walks away, and we goes down the road a piece, and he stops, and tells me to keep going, and I keeps going, and that is the last time I saw him.

Q. How much money did you get?

A. He gave me $50.00.

Q. How did he give you the $50.00, or when?

A. He gave me $50.00 that night.

Q. Where were you?

A. Where was I?

Q. Yes.

A. At his house.

Q. Where did he get the $50.00?

A. Out of his wife's purse.

Q. Out of his wife's purse?

A. Yes, sir.

Q. What did you do with the $50.00?

A. I rolled it up and put it in my pocket.

Q. Where is it now.

A. I spent it.

Q. What did you buy with it?

A. I don't know, sir, what all I did not buy with it. I spent it. I don't know what all I did not buy with it. I paid some of my bills with it, and different things.

Q. What bills did you pay, who did you pay.

A. Let me see, I forgets that now. It was the Federal Clothing Company, for one.

Q. How much was it?

A. I paid him up.

[fol. 220] Q. How much did you pay him?

A. Three weeks, $3.00.
Q. $3.00?
A. Yes, sir; paid $3.00.
Q. Who else did you pay?
A. I owed a fellow $15.00.
Q. Who was that fellow?
A. I will call that name in a minute. I can't think of his name. I been knowing the man 3 years, and can't call his name. Mr. William Stokes. He is a cow buyer, and he buys cows and different things.
Q. Where does he live?
A. I don't know. He doesn't stay in one place long.
Q. Can't you remember his name?
A. William Stokes.
Q. William Stokes?
A. Yes, sir; William Stokes.
Q. A cow buyer?
A. Yes sir; a cow buyer. I met him coming from Abraham's and paid him $15.00.
Q. What did you owe him $15.00 for?
A. It was when it snowed, when snow was on the ground, and I borrowed $15.00 from him. I was out of work, and he let me have $15.00.
Q. Who else did you pay off?
A. I did not pay anybody else off.
Q. What did you do with the money?
A. I bought these trousers I got on now.
Q. Where about?
A. I don't remember the name of the store.
Q. Where was the store located?
A. On Main Street.
[fol. 221] Q. On Main Street?
A. Yes, sir.
Q. How much did you pay for the trousers?
A. $4.98 for the trousers.
Q. What else did you buy?
A. I bought some groceries with it, and the rest of it I had a good time off it.
Q. What do you mean by a good time?
A. Nothing but drinking beer and having a good time.
Q. What kind of a good time?
A. I went to West Memphis and shot craps over in West Memphis.

Q. You shot craps?

A. Over in West Memphis; yes, sir.

Q. Was there a ring on the woman's finger?

A. No, sir.

Q. You did not see a ring there?

A. There was not a ring, it was nothing but a wrist watch, and he told me to take the wrist watch off and to hand it to him, and he told me to keep walking and don't look back.

Q. Did you get a little leather pouch with her dress or under clothes in it?

A. No, sir.

Q. Did you get any blood on your clothes?

A. No, sir.

Q. What kind of clothes did you have on?

A. The clothes I had on was some old khaki pants, and I burned them up because they were full of grease.

Q. You burned them up because they were full of grease?

A. Yes.

Q. Where did you burn them?

A. The Mid-South Pipe Company, on Chelsea.

[fol. 222] Q. Do you remember the day you burned them?

A. Yes, sir.

Q. What day?

A. Last Monday.

Q. La*dy* Monday?

A. Yes, sir.

Q. Now when you hit Mrs. Asheraft on the head with this rock did you hold it in your hand and pound her on the head with it, or just go ahead and tell us how it happened?

A. I hit her with the rock, with the two white rocks.

Q. You first pushed her in the water?

A. First tried to push her in the water, and I could not, and me and her husband, Mr. Johnny Asheraft—me and him both put her in the water.

Q. All right.

A. And then I knocked her in the head. He handed me the two rocks, one by one, and I hit her with the first rock, and he said, "Hit her again", and I hit her again, and he said, "let's walk away", and we walked away.

Q. Nobody has mistreated you in any way since you have been up here, have they?

A. In no way.

Q. Nobody has promised you anything at all?

A. No sir.

Q. That is since you have been up here, or at any time?

A. No sir.

Q. Has anybody laid the weight of a hand on you since you have been up here?

A. No sir.

Q. The statement that you have just made was made of your own free will?

A. Yes, sir.

[fol. 223] Q. And why was this statement made?

A. Why was it made? I want to be straight with it. The reason the statement was made, I asked him—or I told him that I would not hold back; I told him if they ever got me for it that I was going to tell the whole story." I said, "I am not going to take your punishment myself if anything comes of it; I am going to tell it just like it was; I am going to tell it about you and me too".

Mr. Becker: That's all.

John his X mark Ware.

Subscribed and sworn to before me, this 16th day of June, 1941. Henry Waldauer, Notary Public. My Commission expires Oct. 8, 1944. (Seal.)

[fols. 224-227] The Court: Gentlemen, I charge you that the statement is competent in evidence only as against the defendant John Ware, and the jury is not to consider it for any purpose as against the defendant Ashcraft. Now, gentlemen, the Court is going to recess. However, you may be sure we are going to do everything to expedite the case, and may hold some night sessions. We will recess now until Monday morning at 9:30 a. m.

(Adjournment.)

[fol. 228] Morning Session—November 27, 1944

Jury Out

The Court: Mr. McCormick, before we start, let the record show that the jury is out. I would like to state this: on Saturday, when we were having the preliminary investigation as to a piece of evidence, which the state was

seeking to introduce against your client, you will recall that your client testified while the jury was out. Now, after he testified and left the stand, the Court observed that he muttered and mumbled in an undertone to himself from the time he left the witness stand until he resumed his seat in the court room. That in no way interfered with the progress of the trial, nor did it in any sense offend the Court. However, later during the trial, in your discretion your client may or may not take the stand in his own behalf. Now, you gentlemen have chosen an unusually high type of jury here, and I thought you might suggest to your client, if in your discretion you see fit, to avoid doing that in the presence of the jury. It didn't interfere at all with the conduct of the trial and this is in no sense a reprimand, but merely a caution to him, as you can readily see that if it happens in the presence of the jury there is nothing the Court can do about it. And I would not want the defendant to do any act that might prejudice his case in the eyes of the jury.

Mr. McCormick: I appreciate the suggestion of the Court.

The Court: Bring in the jury, Mr. Sheriff.

Jury In

Mr. George A. Becker resumed the stand and testified as follows:

Direct Examination.

Continued by General Gerber:

[fol. 229] Q. Mr. Becker, when the jury retired on Saturday afternoon, you had testified with reference to the taking of certain statements from the defendant Ware, and the execution of the statement, which statement was read to the jury. I believe you testified that Dr. McQuiston was present at the time the statement was read back to him?

A. That's right, yes, sir.

Q. Now, after the statement had been concluded, will you please state to the jury what if anything Dr. McQuiston did there about the defendant Ware?

A. He made an examination of Ware.

Q. I will ask you if Ware at that time was asked to disrobe so that the examination could be made?

A. Yes, sir, he was.

Q. Mr. Becker, after that statement was made, you had previously testified that about two o'clock on the morning of Friday, June 6th, that is, the morning after the discovery of the body, you were in the home of the defendant Ashcraft, at which time you saw a watch?

A. Yes, sir, that's right.

Q. I believe you testified that at that time you paid no attention to the wrist watch and did nothing about it?

A. That's right.

Q. After this statement was made on that early morning of June 16th, state to the jury if anything was done about that wrist watch?

A. After Ware made his oral statement to us, Mr. Key was sent to Ashcraft's home to get the watch and bring it to the jail.

Q. I will show you a wrist watch, which has been made exhibit "H" to your testimony. Is that the wrist watch [fol. 230] that he brought back?

A. Yes, sir.

Q. Mr. Becker, up until that time, that is, up until the time that the defendant Ashcraft, late on Sunday night, June 15th, told you about Ware, had you ever heard about Ware in your life?

A. No, sir, I didn't know there was a man named Ware.

Q. After you concluded there with Ware on that early morning, what was done after that?

A. After the doctor had examined Ware, Dr. McQuiston, Sheriff Joiner, Mr. Battle, Mr. Ezell, Mr. Waldauer and myself went to the other office, the theft squad office, on the opposite side of the building, where Dr. McQuiston had a conversation with Mr. Ashcraft, and after that conversation was had with Mr. Ashcraft, Dr. McQuiston made an examination of him. His clothes were removed and Dr. McQuiston made an examination of him, and after that Dr. McQuiston left, and after Dr. McQuiston left, Mr. Ashcraft was served breakfast, and after breakfast Mr. Ashcraft was brought back to the homicide office, and the negro was brought in the office and I read the negro's statement to Mr. Ashcraft and Mr. Ashcraft and the negro had a conversation, and the negro——

Q. Don't relate anything that happened in so far as Mr. Ashcraft is concerned.

A. The negro was then sent out of the room.

Q. I want to show you a photographic map of the streets

outside the City Limits, and ask you if you can indicate on that map where this slough was that the body was found in?

A. (examines photograph) The slough was right out in here.

General Gerber: I would like to get a pen and mark this spot.

[fol. 231] (Photograph marked with "X" in ink).

Q. As I understand it, running along here is Raleigh Road?

A. Yes, sir.

Q. I want you to show us, with reference to that slough, where 3520 Stanton road was, the home of Mr. Asheraft?

A. Here. (marks on photograph.)

Q. You have indicated with pen?

A. Yes, sir.

Q. Show that to the jury.

A. (witness exhibits photograph to jury)

Q. Now, Mr. Becker, I want you to indicate on this map where the defendant Ware lived on Oriole Street.

A. (marks on map) There.

Q. I believe you stated it was 1.9 miles from 3520 Stanton Road, the home of the defendant Asheraft, to this body of water or this slough?

A. Yes, sir.

Q. How far is it from 3520 Stanton Road, where the defendant Asheraft lived, to the home of Ware on Oriole Street, just off Chelsea?

A. About one mile.

Q. Mr. Becker, after you had completed your investigation that morning, I will ask you whether or not warrants were procured for these two defendants?

A. Yes, sir.

Q. What time that morning?

A. I imagine in the neighborhood of nine o'clock. I am guessing at the time. I don't know.

Q. At the time or after you took these statements, I will ask you to state to the jury whether or not you took from Ware the shoes he was wearing at the time?

[fol. 232] A. Yes, sir, I did.

Q. I will ask you to state to the jury if you made an effort to match either of his shoes with the footprint that appeared on that seat?

A. I did, yes, sir.

Q. I want to show you a pair of shoes. Are these the shoes you obtained from Ware?

A. Yes, sir.

General Gerber: We first want to offer this map—put thumb tacks so the jury can see these locations there.

(Map fastened to board by thumb tacks)

General Gerber: I offer this map in evidence as Exhibit "N".

(Exhibit N Becker received in evidence)

General Gerber: If your Honor please, I want to offer these shoes in evidence as exhibit "O".

(Exhibit "O" received in evidence)

Q. State to the jury if at that time you were able to match either of those shoes with the shoe print on that seat?

A. The left shoe, yes, sir.

Q. Mr. Becker, come down and show the jury how you brought that about.

A. The mud on the shoe sole, this overhang here in the negro's shoe, and when you pressed that down, by the overhang of the shoe.

Q. Did it match at that time?

A. Yes, sir.

Q. And you say that this part of the shoe caused that print?

A. Yes, sir.

[fol. 233] Q. Mr. Becker, after the statement of Ware was concluded on that particular morning, and after this occurrence between Ware and the defendant Ashcraft, at which time Ware's statement was read to Ashcraft, and after Dr. McQuiston had had this conversation with Mr. Ashcraft and the warrants were issued, at any later time did you have occasion to take the defendant Ware anywhere?

A. Yes, sir, the next day, which was Tuesday, Mr. Ezell and I put Ware in our car and drove him out to his home. From there we asked him to direct us to Mr. Ashcraft's home and to the slough. He showed us how to get to Ashcraft's home and he showed us how the car was parked and how he had sat on the running board of the car and how he

hid behind the blind spot on the left hand side of the car, and he directed us to the slough. When we got to the slough he also told us how to get down to the slough. I took the place of Mrs. Ashcraft and walked the negro the distance Ware indicated he had walked. Mr. Ezell and Ware followed behind and he showed us what had happened. We asked him about the size of the rock that he hit her with and he picked up a couple of rocks, indicating the size of the rocks, and we brought them in.

Q. I want to show you a couple of rocks——

Mr. McCormick: Now——

Q. —Indicating the size of the rocks used.

A. This is one he picked up, indicating the size of the ones he used.

General Gerber: We are offering these as exhibit "P".

(Exhibit "P"—Becker received in evidence)

Q. Mr. Becker——

Mr. McCormick: Now, may it please your Honor, I move the court to strike from the record as being incompetent here, and illegal, all the testimony that Mr. Becker has related to this jury in which he states that he took John [fol. 234] Ware to these places and had these conversations, and got these directions, and all that, upon the ground that his actions in so doing were illegal and the evidence that he has related is incompetent; that John Ware has, according to his testimony, made a full and complete confession and he reduced it to writing, and that he had plead before a magistrate, had been arraigned before the magistrate and was in jail, and I submit to this Court that Mr. Becker had no right, or no other officer, or nobody else, had any right to take him in custody again and prolong this thing and go out and keep after him after he had plead before the magistrate and was arraigned and was in jail here, and that is all incompetent, and his activities were illegal from every standpoint, and I object to it. It isn't claimed that the rocks introduced in evidence were the same rocks that had to do with the killing of Mrs. Ashcraft. I move that the testimony be ruled out.

General Gerber: That is a very novel objection.

Mr. McCormick: It may be novel, but I am making it, Mr. Gerber.

General Gerber: I have listened to this objection very attentively. I want to make this statement: I have never heard such an objection made in this case before, and we say it is competent, and for that reason we offer it.

The Court: The objection will be overruled, Mr. McCormick. You may note your exception.

Mr. McCormick: I do note an exception.

Q. Was there any objection on the part of Ware in going on that trip?

A. No, sir, there wasn't.

[fol. 235] Q. Mr. Becker, I want to ask you if out at this slough there were many or few rocks, out there where these rocks which have been introduced in evidence came from?

A. There were many rocks out there. At this place there used to be an old street car line and it is made up of broken concrete and asphalt.

Q. Does this photograph show the old car line?

A. It shows rocks sticking out up there.

Q. From the time that Mr. Asheraft was brought to the jail on Saturday night, June 14th, until the time that he was formally charged with murder on Monday, June 16th, was he denied the right to smoke cigarets or denied food or water or anything of that character?

A. No, sir, he had all the cigarets he wanted and fed when he wanted food and had all the water he wanted.

Q. On the night of June 5th you say that Mr. Asheraft was brought up here to the jail and you talked with him until about two o'clock in the morning. I believe you stated that you talked to the negro Cora Taylor and a negro named Plummer and another negro named Kimbrough and Mr. Asheraft until two o'clock in the morning; when he was taken home?

A. Yes, sir.

Q. State to the jury whether or not during that conversation with Mr. Asheraft, anything was said by him as to the physical condition of his wife?

A. Yes, sir, he told us his wife was in a nervous state; that some-time previously she had had most of her female organs removed, and in January of that year, 1941, both Mr. and Mrs. Asheraft had had the flu, and since that time she had been much worse, and sometimes she would [fol. 236] start screaming, get screaming spells and he would have to leave the house. He also told us that she

had been taking amytal and in the mornings he would get up and fix his breakfast sometimes and leave the house and she wouldn't even be up.

General Gerber: You may take the witness.

Cross-examination.

By Mr. Bickers:

Q. Mr. Becker, I understand that you and some other deputy drove in a car up to the Asheraft home on Stanton Road the day you found the body?

A. That's right.

Q. Now, Mr. Mateer crossed the street out there to a neighbor's house in front of Mr. Asheraft's house?

A. I understand he did. I wasn't there.

Q. You came up later?

A. Yes, sir.

Q. When you got there had Mr. Mateer come back across the street with Mr. Asheraft to Mr. Asheraft's house?

A. The first I remember seeing him was when we came around the corner and I saw them in the yard and when we drove up and walked into Mr. Asheraft's house, we did that together.

Q. Mr. Asheraft was there with three deputies?

A. There was Mr. Asheraft, Mr. Mateer, Mr. Davis, Mr. Key and myself.

Q. Four deputies?

A. Yes, sir.

[fol. 237] Q. I understand that when you got in the house you naturally began to ask Mr. Asheraft if he knew anything about this?

A. Yes, sir.

Q. And you stayed there some little time?

A. We were not there long.

Q. Fifteen or 20 minutes?

A. Just a little while.

Q. Did you make an examination of the house during that time?

A. I don't think I did. I may have walked in the other room.

Q. And your examination was had of Mr. Asheraft in the living room?

A. The first room as you go in the door.

Q. What was the condition of that house with reference to whether it was torn up or clean and orderly?

A. The house was in a neat condition.

Q. Ordinary condition?

A. From what I saw of it.

Q. How long after the tragedy did you take Cora Taylor into custody?

A. I can only guess at this time, because we had completed what we were doing at the Collins Funeral Home and had come back to the jail.

Q. Was it that day that you took her into custody?

A. That night.

Q. She was brought to jail and put in a cell?

A. Cora Taylor was brought to jail and questioned and after questioning her we got Kimbrough and this negro Plummer.

Q. And you brought those two here?

[fol. 238] A. We kept both of them here.

Q. You kept Cora Taylor, who was the maid of the Ashcraft's?

A. Yes, sir.

Q. You kept all three of them here for ten days?

A. I would say about that time.

Q. And during that time you questioned them?

A. I talked to them several times.

Q. And during all that time did Cora Taylor ever tell you anything other than that as far as she knew, and during the time she was at the Ashcraft home, Mr. and Mrs. Ashcraft got along all right?

General Gerber: We object to what Cora Taylor said.

The Court: Objection sustained.

Q. Well, I will ask you if you learned from Cora Taylor anything with reference to the location of the watch?

General Gerber: We object to anything Cora Taylor told him.

Mr. Bickers: I didn't ask him what she told him.

General Gerber: For the reason that it is purely hearsay made outside of the presence of this defendant.

The Court: Objection sustained.

General Gerber: He has Cora Taylor subpoenaed.

Mr. Bickers: Note an exception.

Q. I will ask you if, when you brought the defendant E. E. Ashcraft to the jail house up there on the fifth floor, in that homicide room—that's where you did your investigating, wasn't it?

A. Yes, sir.

Q. You have in that room all of the essentials that you consider necessary to make a proper investigation in a [fol. 239] homicide case—I mean finger print machines and a light up there and picture-making apparatus?

A. There is no finger print machine. It is a table with a glass plate to hold the ink and a rack to hold the finger-print card. That composes the finger-print outfit. There is a camera up there and we take what we call "mug" pictures.

Q. When you got to this place I believe you testified previously it was about seven o'clock. You took the defendant Ashcraft and sat him down at the end of a small table?

A. Are you talking about the first night?

Q. I am talking about the 14th, when you brought him up there at seven o'clock at night.

A. Saturday the 14th, yes, sir.

Q. Will you tell the jury just about the size of that table?

A. It isn't a table. It is a desk. I imagine it is about as wide as that (indicating table) and four feet long.

Q. About three feet wide and four feet long?

A. In my best judgment, yes.

Q. He sat at the end of the table with Mr. Battle on one side—you have previously stated that Mr. Battle was there, a. Mr. Ashcraft was at the end of the table?

A. Yes, sir.

Q. And there is a light over that table?

A. There is a light hanging up from the ceiling.

Q. And that reflects on the table?

A. Yes, it is down on the table.

Q. Mr. Battle was the first Assistant Prosecuting Attorney for this County?

A. He was assistant prosecuting attorney.

[fol. 240] Q. And you know that he is the same party that signed this indictment here as attorney general pro tem?

A. I don't know about that.

General Gerber: We will admit that. He is the same man.

Q. When you got him in this position, he at the end of the table, Battle on one side and you on the other, with that light hanging down over his head, you began questioning him with reference to anything he might know about this tragedy?

A. We did.

Q. And you continued that until 12 or one o'clock that night?

A. I questioned him from Saturday night about 7:00 or 7:30 until about three o'clock the next morning.

Q. And Mr. Battle was there with you?

A. Yes, sir.

Q. You would ask him some questions and then if Mr. Battle thought of some questions, he would ask him?

A. Yes, sir.

Q. You just cross-examined him backwards and forwards?

A. Yes, sir.

Q. At all—and you say at 11:00 o'clock that night you charged him with the murder of his wife? That's your testimony?

A. No, I said about 11:00 o'clock on that night he told us that he knew that everything pointed to him, and later on I told him.

Q. What do you mean by later on?

A. Well, we questioned him some little time.

Q. You have testified in this case three times?

A. Yes, this is the third time I think.

[fol. 241] Q. I will ask you if this question was asked you and if you made this answer:

> "Question: What I want to know is, did either you or Mr. Battle tell him, between 7:30 and 11 o'clock," talking about that night, "that you had him up there for the purpose of questioning him with regard to the killing of his wife?"

Q. Is that right?

A. If that's in there it is right.

Q. It's in there. Do you want to see it?

A. Then it's right.

Q. And your answer:

> "That was the reason he was brought up there."
>
> "Question: That's it. Now, before you questioned him, did you tell him that?

"Answer: You see—

"Question: Did you tell—

"General Gerber: Let him finish his answer.

"Question: Tell me.

"Answer: Tell you what?

"Question: How soon after you brought him there was it before you told him, 'any statement you make can and will be used against you in court and you are entitled to counsel right now.' How soon did you tell him that?

"Answer: We told him that when he made the written statement."

Q. Is that right?

A. Yes, sir.

Q. You told him that Monday morning?

A. Yes, sir.

Q. You had him up there from 7:00 o'clock, and you told [fol. 242] him Saturday night, sometime after 11:00 o'clock, and before you quit questioning him Sunday at three o'clock, that you believed he had killed his wife?

A. Yes, sir, I did.

Q. Did you prefer a charge against him when you made that statement to him?

A. No, sir.

Q. You didn't make the slightest effort to swear out a warrant?

A. Not at that time.

Q. And after that you continued to question him until Monday morning?

A. About three o'clock Sunday morning.

Q. I will get to that. You and Mr. Battle quit questioning him about two or three o'clock Sunday morning?

A. Yes, sir.

Q. Why did you quit?

A. Because I was tired. I had been working on this thing ten days and ten nights.

Q. That's all right.

General Gerber: Let him testify.

Q. Go ahead and finish.

A. I have finished.

Q. So we can understand your answer, you quit because you were tired; you had been on this case sometime?

A. Ten days and ten nights.

Q. And up until that time, at 7:00 o'clock Saturday night, when you had Mr. Ashcraft brought in, for ten days and nights you had been investigating every angle imaginable and you had not found one single solitary thing that indi-
[fol. 243] cated that Mr. Ashcraft was guilty?

A. If you mean the spoken word, no.

Q. When he was arraigned Monday morning on a warrant issued by Squire Magevney, you and Mr. Key and Mr. Ezell and Mr. Jayroe I believe were marked as witnesses on the back of that warrant?

A. I imagine so.

Q. And he was arraigned at 8:00 o'clock in the jailhouse?

A. I don't remember the time.

Q. He was arraigned on Monday morning after you had been questioning him from Saturday night until Monday morning?

A. Yes, sir. He was arraigned on a warrant.

Q. And you didn't testify, did you?

A. Not before the magistrate.

Q. Do you know of your own knowledge any other deputy sheriff that testified?

A. I don't.

Q. And you know he plead not guilty?

A. I don't know that.

Q. You have never seen the warrant?

A. Not after I made the affidavit.

Q. It never interested you to find out what his plea was?

A. I was interested in the case, yes, sir.

Q. Didn't it occur to you that it would be a good idea to see whether the man plead guilty or not guilty?

A. No, sir, it didn't.

Q. Do you know of your own knowledge whether or not Mr. Ashcraft was arraigned the day of the hearing on this warrant on the fifth floor of this jailhouse?

[fol. 244] A. Of my own knowledge I don't.

Q. You don't know whether it was up or downstairs?

A. No, I do not.

Mr. Bickers: You may take the witness.

Cross-examination.

By Mr. McCormick:

Q. Mr. Becker, you went out to John Ware's house about 12:00 o'clock on Sunday night?

A. I would say it was about that time when we left the jail here.

Mr. Bickers: May I interrupt for a moment? This is an omitted question.

Cross-examination.

By Mr. Bickers:

Q. When you quit the examination of Mr. Ashcraft at 3:00 o'clock Sunday morning, do you know who took over the examination of him?

A. I think Mr. Ezell.

Q. When did you take over the next time?

A. I came back about 7:00 o'clock Sunday morning.

Q. What time did you quit?

A. I quit about noon Sunday.

Q. Who was with you each time?

A. Mr. Battle.

Q. Who took over at noon Sunday when you quit?

A. Mr. Ezell I think.

Q. When did you next take over this examination up there?

A. I talked to him about 7:00 or 7:30 Sunday night.

[fol. 245] Q. Mr. Battle was with you at that time?

A. Yes, sir.

Q. You turned him over to Mr. Ezell about 2:00 or 3:00 o'clock Monday morning?

A. He asked to talk to Mr. Ezell and that was about 11:00 o'clock Sunday night.

Q. During all this time, as I understand it, you would take time out about every seven or eight hours and rest because you were tired?

A. That's right.

Q. I will ask you if the defendant Ashcraft slept any during your examination on these three or four occasions?

A. So far as I know he didn't, but according to his own statement he had been home ten days and nights doing nothing.

Q. But as far as you know he hadn't slept during that entire time he was questioned?

A. No, sir.

Cross-examination.

By Mr. McCormick:

Q. Mr. Becker, when you went out to pick up Tom Ware, you picked him up as the man whom you thought Mr. Ashcraft hired to help kill his wife?

A. No, sir.

Q. Then what on earth did you go out there for and pick him up when according to your statement you had never heard of him?

A. Because Mr. Ashcraft had thrown suspicion on him the same as he had on Cora Taylor. He was picked up the same way Cora was.

Q. As I understand your testimony originally, when Mr. Ashcraft said that to you, you said "If he killed your wife you hired him to do it?"

[fol. 246] A. I certainly did because I couldn't conceive any man, knowning that a ngero had killed his wife, who knew who the negro was and knew where he lived and knew the law had been looking for him and had not reported it to the law.

Q. I am going to ask that you answer my question.

A. I have.

Q. You went out there with the conclusion in your mind, or certainly the suspicion in your mind, after you had talked to Mr. Ashcraft, that Ware had been hired by Ashcraft to kill his wife?

A. I did not. My statement to Ashcraft was, "If a negro is concerned in this you hired him to do it." I said if a negro was concerned in it. I picked up this negro because Ashcraft had stated that and I wanted to find out what the negro knew.

Q. Why, Mr. Becker, you just said that you told Mr. Ashcraft "If this negro had anything to do with it, you hired him to kill your wife?"

A. I still didn't know the negro had anything to do with it.

Q. You went out there and I believe you stated that Mr. Ashcraft knew where the negro lived?

A. Yes, sir.

Q. Why, Mr. Becker, don't you know that he directed you to the wrong house?

A. The wrong street.

Q. And the wrong house, too?

A. Yes, sir, it was just next door.

[fol. 247] Q. Mr. Ashcraft didn't even know where Ware lived?

A. One house south.

Q. All right. You knew, right at the beginning, that to convict this negro of this murder you had to get a confession from him upon which to convict him?

A. I didn't know at the time that the negro had anything to do with it, Mr. McCormick.

Q. I will grant you that; but if you thought that Mr. Ashcraft hired Ware to kill his wife, you knew that to convict Ware you had to get a confession up there on the fifth floor of this jail upon which to convict him?

A. No, sir, because people have been convicted before without confessions.

Q. Of course they have. Why didn't you try to convict John Ware without a confession? That's what I'm asking you.

General Gerber: That's argument.

Mr. McCormick: It isn't argument.

General Gerber: We object to it.

The Court: Objection sustained.

Mr. McCormick: Note an exception.

Mr. Bickers: Let me make this objection: I ask your Honor to instruct the jury that none of this testimony, as it relates to Mr. Ashcraft, can be considered for any purpose. I don't want to get put in the middle.

General Gerber: We want the record to show that the State is trying to keep it out.

The Court: I have instructed the jury before.

[fol. 248] Mr. Bickers: But this has not come up.

The Court: Gentlemen, what is said here, conversations or anything that happened between the defendant Ware and Mr. Becker is not competent against the defendant Ashcraft for any purpose and you won't consider it——

Q. Mr. Becker, you brought Ware down here. When you waked him up there were three people in the bed?

A. Two negro men and one woman.

Q. And you three the light on John Ware and told him to get up and dress?

A. Yes, sir.

Q. You didn't tell him what you wanted with him?

A. No, sir.

Q. Did you tell him you wanted him for the murder of Mrs. Ashcraft?

A. I did not.

Q. You told him to get up and dress?

A. Yes, sir.

Q. It was 12 o'clock at night and he was asleep?

A. I don't know whether he was or not. We turned him over and his eyes were open.

Q. You scared him pretty bad?

A. He didn't appear to be scared.

Q. Mr. Ezell and Mr. Jayroe were in there with you?

A. Yes, sir.

[fol. 249] Q. Didn't Ware appear to be frightened?

A. I didn't notice him being frightened.

Q. You told him to get in the car?

A. Yes, sir.

Q. While he was walking down the steps did anybody hit him?

A. Not to my knowledge.

Q. Did you put handcuffs on him?

A. Not at that time.

Q. Didn't somebody knock him in the head when he was walking down the steps?

A. No, sir.

Q. You virtually carried him to the car?

A. No, sir, he walked to the car.

Q. Coming down to the jail, did he ask anybody what you wanted him for?

A. To my knowledge he did not.

Q. You brought him here to the jail?

A. Yes, sir.

Q. And took him to the fifth floor?

A. Yes, sir.

Q. Into this room?

A. Yes, sir.

Q. Now of course none of his friends or his people were there?

A. No, sir, they were not.

Q. And he didn't have a lawyer there?

A. He did not.

Q. Mr. Battle was there representing the State?

[fol. 250] A. Mr. Battle was on the investigation.

Q. He is a pretty able lawyer?

A. Yes, sir.

Q. He represented the State?

A. Yes, sir.

Q. Why didn't you call John Ware a lawyer?

A. I wasn't under any obligation to call him a lawyer. He didn't ask for one and at that time I didn't even know that he needed a lawyer.

Q. When you found out that he did need a lawyer, why didn't you call him one?

A. Because I wasn't under any obligation to call one. He didn't ask for one.

Q. You have been a deputy sheriff in the homicide department for a long time?

A. That's right.

Q. And you have heard these cases tried around here ten or 15 years?

A. Yes, sir.

Q. You know that the constitution of the State requires that John Ware have a lawyer?

A. I know that it doesn't require that I get one for him.

Q. You know that this County has a public defender?

A. I do.

Q. That public defender is paid a salary by this county to represent people like John Ware, a negro without money?

A. He is paid to represent people.

Q. Why didn't you call the public defender?

A. Mr. McCormick, I was under no obligation to call him a lawyer.

[fol. 251] Q. You didn't want a lawyer there because you wanted to get a confession from John Ware and convict him?

A. It didn't make any difference to me whether he had a lawyer or not. He didn't ask for one and I didn't get him one.

Q. You know it to be a fact now that there is no earthly way of convicting John Ware in this case——

(At this point General Gerber rose to his feet.)

Mr. McCormick: I'll withdraw the question. Sit down.

Q. You got this paper that you have introduced in evidence here. Did you take John Ware at any time to this cell of solitary confinement that you have in the jail—the sweat box?

A. I did not.

Q. What floor is that on?

A. There is what we call a padded cell where we put insane people. I believe that's on the second floor.

Q. You believe it's on the second floor; don't you know?

A. No, I have been here 15 years and I don't think I have ever been in that thing. I know there is one here.

Q. You didn't put him in there?

A. I didn't.

Q. Do you know whether or not anybody told John Ware that the mob would get him if he didn't come through and tell this story?

A. I didn't tell him that and to my knowledge I didn't hear anybody else tell him.

Q. You didn't bring Dr. McQuiston down here to examine Ware?

A. Dr. McQuiston was brought here because he was Mr. Asheraft's doctor.

Q. Why did you have John Ware stripped of his clothes so Dr. McQuistion would go over him?

[fol. 252] A. We had him examined because some people, the first thing they do when they get here is holler that they have been whipped and beaten up and we wanted Dr. McQuistion to see that he hadn't been beaten up.

Q. You called in some other people, some business men?

A. That wasn't in connection with Ware.

Q. And you called them in to bolster up this confession?

General Gerber: Let me say this: I don't want to be in the attitude of interrupting Mr. McCormick, but I think he realizes that he is treading on dangerous ground in so far as the defendant Asheraft is concerned here. We are trying hard to comply with certain orders of the Court, and as a representative of the State, I want the record to show that we are trying to keep this matter out of the record.

Q. Now, after this arraignment, you took Ware to the scene of this crime?

A. No, sir, he showed us out there.

Q. You had been there before. Why do you say that he had to show you the way?

A. We got him to direct us out to Mr. Asheraft's house and then to this slough. I had been there on a number of occasions.

Q. And you went out there and picked up those rocks?

A. I didn't pick them up.

Q. You had him do it?

A. I asked him to do it.

Q. I notice in this record, in this so-called confession that John Ware made, and it is on that statement that you [fol. 253] are seeking to convict him, according to that statement he says that he and Mr. Asheraft never touched the woman, but pushed her in the water and while she was struggling in the water, he picked up a rock and threw it at her while she was struggling. That he picked up another one and threw it at her while she was struggling in the water and killed her. That's what he says in that statement?

A. That is in the statement.

Q. And that's all the evidence you have in this case as to how Mrs. Asheraft was murdered?

A. That's what the negro told us.

Q. And that's all the evidence you have?

Mr. Gerber: I object to that; it's argumentative.

Mr. McCormick: I am asking him what he knows.

General Gerber: We object. It is purely argumentative.

The Court: Of course I realize that cross-examination is very broad, but nevertheless I don't think that's a proper question.

Q. This lady was fully clothed?

A. Yes, sir.

Q. Her glasses were on her head?

A. Hanging in her hair.

Q. Her shoes and stockings were on?

A. Yes, sir.

Q. You heard the testimony of Dr. Ridgon?

A. No, I didn't hear it.

Q. He testified that there were four major blows on her [fol. 254] head that crushed her skull and injured her brain?

A. I didn't hear him testify.

Q. You were out there that afternoon about 4:00 o'clock?

A. Which afternoon?

Q. The same afternoon of the discovery of the tragedy.

A. We got a call about 4:45 and of course we had to drive out there. We got there in the neighborhood of 5:00 o'clock.

Q. And you found the automobile there then?

A. Yes, sir.

Q. And you examined around the slough?

A. That's right.

Q. And then went on back to Mr. Ashcraft's house?

A. Yes, sir.

Q. And over to Cora Taylor's house and called Weller Brothers to come get the automobile?

A. We had Mr. Davis do it.

Q. Were you there when Weller Brothers got the car?

A. I think so.

Q. They took it to their place of business on Madison?

A. Yes, sir, it is on Madison.

Q. Then you continued your investigation and talked to Mr. Ashcraft until two o'clock that morning, and sometime the next day you sent out to Weller Brothers and had the car brought in?

A. No, sir, I went over there and got the car, at Wellers.

Q. You knew from the beginning that the very best way to solve this murder was right on the spot and the first thing to do was to try to get finger prints off that automobile, as an experienced homicide man?

[fol. 255] A. Well, as one who has had experience with finger prints, I knew that finger prints at that time were practically impossible to get because the car had sat out in the dust. Dust absorbs moisture and we couldn't get any prints.

Q. You didn't try to get any finger prints?

A. I have given you my reason.

Q. But you didn't try?

A. No, I didn't.

Q. And you allowed the car to be taken by Weller Brothers and stay out there overnight?

A. Yes, sir.

Q. With people possibly climbing up all over it?

A. That car was locked and I had the key in my pocket.

Q. You say the car got dusty?

A. Yes, sir.

Q. And you didn't try to get any finger prints that night?

A. No, sir.

Mr. McCormick: I believe that's all. If I have another question later I will ask it with the Court's permission.

The Court: Anything further from this witness?

General Gerber: That's all.

Mr. Bickers: That's all.

(Witness excused.)

The Court: We will take a short recess.

(Recess.)

[fol. 256] HENRY S. WALDAUER, called as a witness by the State, being first duly sworn, testified as follows:

Direct examination.

By General Gerber:

Q. State your name to the Court and Jury, please, sir?

A. My name is Henry S. Waldauer.

Q. You are in what business?

A. I am a court reporter.

Q. You report cases in court just like Mr. Combs, who is reporting this case?

A. Yes, sir, I do.

Q. You have been a court reporter how long?

A. For 24 years.

Q. And have you reported in all of the courts in this county?

A. Yes, sir, I have.

Q. What other reporting have you done, other than in the courts around here?

A. I have reported, for a number of years, the more important hearings for the Railroad and Public Utility Commission of Tennessee; I have served as reporter for various committees of the United States Senate and House of Representatives; and in 1925 I was the official reporter for the Peace Conference held following World War One, and I have done reporting for various bureaus that are functioning under the National Administration.

Q. Have you ever reported any matters for Mr. McCormick?

A. Yes, sir, I have.

[fol. 257] Q. I will ask you if on June 5, 1941, you had any connection with any governmental agency of any kind?

A. No, sir, I did not.

Q. You were a free lance reporter at that time?

A. Yes, sir.

Q. Mr. Waldauer, I will ask you to state to the jury if, on the early morning of June 16, 1944, you had occasion to come to this place?

A. No, sir, not 1944.

Q. 1941 I mean?

A. Yes, sir.

Q. About what time did you receive the call to come here?

A. 1:40 A. M.

Q. Who called you?

A. I was called by you.

Q. Did you immediately come to this jail?

A. Yes, sir, I did.

Q. After you got to this jail on that particular night, where did you go?

A. After meeting you in the lobby, I was taken to the fifth floor of the building to a room in the northwest corner.

Q. What kind of a room was that?

A. It was just an ordinary room, about ten by ten. It had a desk in the middle of the room and there were chairs around.

Q. Mr. Waldauer, I will ask you if at that time you took the statement of any person?

[fol. 258] A. Yes, sir, I did.

Q. Whose statement did you take?

A. John Ware's.

Q. Do you remember who was present at that particular time?

A. Yes, sir, Mr. Battle was present, Mr. George Becker and myself.

Q. I will ask you to state if at the time this statement was made to you, or made in that room, which was taken by you, of John Ware, the defendant in this case, whether the answers made by him were freely and voluntarily made?

A. Yes, they were.

Q. I will ask you whether anybody mistreated him or whether anybody abused him while you were there taking that statement?

A. Not a hand was laid on him.

Q. Did anybody curse him?

A. No, sir.

Q. Mr. Waldauer, how did you take the statement?

A. In shorthand.

Q. In shorthand, like Mr. Combs is taking this record now?

A. Yes, sir.

Q. Do you know how long it took you to take that statement in shorthand?

A. I would estimate it to be about 20 or 25 minutes; that's purely an estimate.

Q. To take it in shorthand?

A. Yes, sir.

Q. You say that I called you at about 1:40. Do you know at approximately what time you reached this building?

[fol. 259] A. I reached here at 2:10 A. M.

Q. And how long was it after you reached here before you began taking the statement of Ware?

A. I began taking his statement five minutes later, at 2:15.

Q. After you took that statement in shorthand, state to the jury what you did?

A. I then went to the sheriff's office on the main floor of this building where I was given a typewriter, and I transcribed my shorthand notes, making an original and four carbons.

Q. What time did you conclude your transcription?

A. I have a memorandum of that which I made, General, if I may be permitted to refer to that.

Q. That's all right.

A. (refers to paper) At 5:40 A. M.

Q. You concluded transcribing it, and I will ask you to state, after the statement was transcribed, where you went?

A. I went back to the fifth floor of this building in the northwest corner.

Q. A statement has been introduced and marked Exhibit "M" to the testimony of Mr. Becker. I will ask you whether that is the statement that was transcribed by you after you had first taken it in shorthand on the early morning of June 16, 1941?

A. (examines exhibit) Yes, sir, it is.

Q. Mr. Waldauer, I will ask you to state to the jury who made the answers contained in that statement?

A. Every answer in this statement was made by the defendant Ware.

Q. I will ask you if anybody interlineated any of those answers of the defendant Ware?

[fol. 260] A. They did not. If they had it would have appeared because when I started writing I took down every word said by anybody in the room.

Q. I will ask you whether anybody changed any of the answers in that statement which you say was made by Ware?

A. No, sir.

Q. I will ask you whether the language contained in those answers is the language of John Ware?

A. Verbatim, yes, sir.

Q. After you had transcribed that statement and brought it back to the fifth floor, state to the jury whether that statemen was read back to John Ware?

A. It was read back to him by First Assistant Attorney General Battle.

Q. Who was present at that time?

A. Mr. Bob Ezell, Mr. George Becker and Dr. McQuiston.

Q. Will you state to the jury whether all of those present at that time had a copy of the statement while it was being read back?

A. Everyone in that room had a copy before them and the reading of it was followed by everyone in the room so that everyone might be certain that it was read back as written.

Q. I will ask you whether Ware at that time was offered a copy of the statement?

A. Yes, sir. He said he didn't know how to read or write.

Q. I will ask you if you followed the reading of that statement?

A. Yes, sir, I did.

Q. And what occurred after the statement was read? What did Ware say or what did anybody say?

[fol. 261] A. I made a notation at that time of everything that occurred. After the statement was read, Ware said: "That is just the way it was." Battle said: "That is what happened?" Ware said: "That is what happened. That is the way I told it, and that is the way it was." Battle said: "Now this gentleman is a Notary Public, and we want you to sign the statement, and swear to it before him." Ware said: "I don't know how to write. I can make my mark." Battle said "All right. He will write your name for you, and have you touch the pen."

Q. What happened about the execution of the statement?

A. I then asked Ware if the statement was correct, in my

capacity as Notary Public, since I was going to take his oath. He said it was. I asked him if there was any word in there that he wanted changed before he executed it, and he said no. I then had him touch the pen. I took his oath and I signed as notary public.

Q. After that statement was concluded, I will ask you to state to the jury whether any examination was made of Ware at that time by Dr. McQuiston?

A. Yes, sir, as soon as the paper had been signed, Ware was asked to take off his wearing apparel. He did so and Dr. McQuistion examined him in my presence.

Q. After that was concluded where if any place did you go in the building?

A. I then went to a room in the southwest corner of the 5th floor.

Q. And who went over there with you at that time, if you recall?

A. I couldn't recall without referring to this paper.

Q. I mean after you got through, did you go over to see Ashcraft?

A. Yes, sir.

[fol. 262] Q. Who went over there?

A. Dr. McQuiston.

Mr. Bickers: I object to any statement this witness makes that has any reference to the defendant Ashcraft and ask the Court at this time that no statement that this man can possibly make has any bearing on the case of E. E. Ashcraft, and further ask the Court to delete from this statement of John Ware's the name of Mr. Ashcraft or any reference to him.

The Court: Of course Mr. Bickers I am not going to let any statement made by Mr. Ashcraft be introduced, but I don't know whether he is going to say that there was or was not a statement made, and——

Mr. Bickers: What is your Honor's ruling?

The Court: General Gerber asked him if he went to the room and saw Mr. Ashcraft and he said he did.

Mr. Bickers: That's as far as he can go.

The Court: There has been no question asked him as to whether Mr. Ashcraft made any statement.

Q. When you got to this room where the defendant Ashcraft was, with Dr. McQuistion, I will ask you to state to

the jury whether Dr. McQuiston and the defendant Asheraft has a conversation? I don't want you to tell what the conversation was, but did they have a conversation?

A. Yes, sir. There were some others in the room that I omitted to name. At that time there was in the room Mr. Becker, Mr. Ezell, Mr. Battle, Mr. Joiner, Dr. McQuistion and myself.

Q. After this conversation took place there between Dr. [fol. 263] McQuiston and the defendant Asheraft, state to the jury whether any examination was made by Dr. McQuiston of Mr. Asheraft?

A. Yes, sir, there was.

Q. Do you remember whether his clothes were taken off and whether Dr. McQuiston examined him there?

A. Yes, sir, he did.

General Gerber: You may take the witness.

Mr. Bickers: I want to renew my motion that the Court delete any reference to the defendant E. E. Asheraft from the statement that this witness has made and any reference to him in that room.

The Court: Overruled.

Mr. Bickers: Exception. No questions.

Cross-examination.

By Mr. McCormick:

Q. You were called by General Gerber to come to the jail at 1:30?

A. No, sir, 1:40.

Q. Now, Mr. Waldauer, I would like, if you please, that you answer my question yes or no, without any explanation that might be incompetent. You understand, Mr. Waldauer? You have been a court reporter for a long time?

A. Yes, sir.

Q. You came in response to General Gerber's call at 1:40?

A. Yes, sir.

Q. You were called for a specific purpose?

A. Yes, sir.

Q. So designated by him?

[fol. 264] A. Yes, sir.

Q. It wasn't to take a statement from John Ware, was it?

A. I don't know how to answer that yes or no.

Q. I think you can answer that. We know about this case, you and I?

A. We do.

Q. You were not called to come to the jail to take a statement from John Ware in your telephone conversation with General Gerber?

A. I will repeat if you want me to the conversation I had.

Q. That's what is incompetent.

General Gerber: How is he going to tell it?

Mr. Bickers: I submit the only answer the witness can give to that question is yes or no.

Q. I will ask you again. When General Gerber called you to come to the jail it wasn't to take a statement from John Ware?

A. At first, no.

Q. That's it. In the conversation you had over the telephone, you were not asked to come and take the statement of John Ware?

A. That is right.

Q. When you came to the jail and got here at 2:10, you had a conference with Mr. Gerber down in the lobby of the jail?

A. Yes, sir.

Q. And after you had that conversation with him, you went immediately and directly to this homicide room?

A. Yes, sir.

Q. On the fifth floor?

A. Right.

Q. And took the statement of John Ware?

[fol. 265] A. Yes, sir.

Q. And you began taking the statement at 2:15?

A. Yes, sir.

Q. And it was read back to John Ware at 5:40 o'clock?

A. Yes, sir.

Q. And when he was asked to sign it, he said he couldn't read or write?

A. Said he couldn't write his name.

Q. And he made his mark?

A. Yes, sir.

Q. Was sheriff Joiner in there when this statement was read to Ware?

A. Yes, sir.

Q. And it was after that that Ware was asked to disrobe and Dr. McQuiston examined him?

A. Yes, sir.

Mr. McCormick: That is all.

(Witness excused.)

General Gerber: There are one or two witnesses who were here in the hall when we started. Will your Honor give us about two minutes?

The Court: Very well.

(Recess.)

[fol. 266] Dr. J. A McQuiston was sworn and testified as follows:

Direct examination.

By General Gerber:

Q. Will you state your name to the court and jury, please, sir?

A. J. A. McQuiston.

Q. You have lived in Memphis how long?

A. Since 1929. I have lived in the county practically ever since I started the practice of medicine.

Q. You follow what profession?

A. The practice of medicine.

Q. Do you know the defendant in this case, E. E. Ashcraft?

A. I do.

Q. Did you know his wife during her lifetime?

A. I did. They were both patients of mine.

Q. What was the condition of Mrs. Asheraft?

A. She would be classed as a nervous type patient, in only fair health.

Q. Doctor, I will ask you if, on the early morning of Monday, June 16, 1941 you had occasion to come to this building?

A. I did.

Q. Were you called and asked to come here?

A. Yes, sir.

Q. At the time you received the call to come here did you know what you were coming for?

A. I did not.

Q. After you got to this building where did you go?

A. To an office on the 5th floor.

Q. State to the Jury if at that time on the 5th floor of this building you saw the defendant Ware?

[fol. 267] A. I did.

Q. What was done up there at that time, doctor?

A. The supposed confession was read to John Ware and he was requested to sign the confession. After it appeared that he couldn't write his name, he was assisted in making his mark by Mr. Waldauer, who took his acknowledgment.

Q. I will ask you whether that confession or statement was read back to John Ware in your presence?

A. It was.

Q. Did you have a copy of it at that time?

A. Yes, I had a copy of it.

Q. After the statement was read back to Ware and was executed in your presence by Mr. Waldauer, I will ask you if you made any examination of the body of Ware at that time?

A. I did.

Q. State to the jury whether that examination showed any signs that anybody had beaten or struck him?

A. There was no indication of such.

Q. Did you ask him how he had been treated?

A. I did and his answer was that he was treated all right.

Q. After you made this examination of Ware I will ask you if you went to where E. E. Ashcraft was?

A. I did.

Q. State to the jury whether at that time you had a conversation with the defendant Ashcraft?

A. Yes, sir, a limited conversation.

Q. I don't want you to state what he said, but you did have a conversation with him?

[fol. 268] A. Yes, sir.

Q. What was his condition at that time, referring to fatigue?

A. He appeared normal.

Q. Were his eyes bloodshot?

A. No, sir.

Q. Was any compleint made to you by Mr. Ashcraft as to any mistreatment of any kind?

A. No, sir.

Q. After you had this conversation with him, was he disrobed and did you examine him?

A. Yes.

Q. Did you find any marks of violence or evidence that he had been struck by anybody?

A. No, I did not.

Q. After that, doctor, was anything served to Mr. Ashcraft?

A. Yes, sir, breakfast was served to him while I was there.

Q. And then you left?

A. Yes, sir.

General Gerber: You may take the witness.

Cross-examination.

By Mr. Bickers:

Q. You had treated Mrs. Ashcraft for a number of years?

A. Yes, sir.

Q. Did you prescribe for her remedies that included narcotics?

A. Yes, on some occasions.

Q. Now you stated a while ago that you noticed nothing unusual in his physical condition in regard to fatigue. Did anybody tell you he had been up 36 hours?

[fol. 269] A. No, sir.

Mr. Bickers: That's all.

Cross Examination.

By Mr. McCormick:

Q. I will ask you just one question. You asked John Ware to disrobe?

A. When I was requested to examine him, I asked him to disrobe.

Q. What kind of an examination did you make?

A. Just a physical examination.

Q. Had you been told by the officers to ask him to disrobe?

A. He had to disrobe if a thorough job is done.

Q. You mean if a man came to you for a physical examination for life insurance you would ask him to take all his clothes off?

A. The Government requires that on a physical examination.

Q. We are not trying a government case.

A. That would depend on the type of policy he wanted.

Q. What did you understand these officers to mean when they asked you to examine Ware?

A. I understood they wanted me to see if there was any indication of mistreatment.

Q. In other words, whether he had been beaten up or not?

A. Yes, sir.

Mr. McCormick: That's all.

General Gerber: That's all.

(Witness excused)

[fol. 270] HARRY QUINN the next witness for the State, being sworn, testified as follows:

Direct Examination.

By General Gerber:

Q. State your name to the Court and Jury?

A. Harry Quinn.

Q. Where are you employed?

A. Mid-South Concrete Pipe Co.

Q. Were you employed there during the month of June, 1941?

A. Yes, sir.

Q. I will ask you if at times during 1941, June, 1941, the defendant John Ware worked for your company?

A. Yes, sir.

Q. You have a book there. What is that book?

A. Daily time and inventory book.

Q. Will that book show the time that John Ware put in during June, 1941?

A. Yes, sir.

Q. Take that book and tell us whether John Ware worked out there on June 2, 1941 and how many hours he worked?

A. Worked nine hours.

Q. How many hours did he work on June 3, 1941?

A. Seven and a half hours.

Q. You have a little bronchial trouble?

A. Yes, sir.

Q. How many hours did John Ware work on June 4, 1941?

A. Nine hours.

Q. How many hours did he work on June 5, 1941?

A. Two hours.

[fol. 271] Q. He reported for work that morning and stayed two hours?

A. Yes, sir.

Q. Do you know why he left?

A. He said he was sick.

Q. State to the Jury how many hours he worked on June 6th?

A. No work.

Q. June 7, 1941?

A. No work.

Q. June 8, 1941?

A. No work.

Q. June 9, 1941?

A. No work.

Q. Did he return on June 10, 1941?

A. Yes, sir, and worked 6-½ hours.

General Gerber: We want to make this book exhibit #1 to his testimony.

The Court: Very well.

(Exhibit #1 Quinn received in evidence)

General Gerber: You may take the witness.

Cross Examination.

By Mr. McCormick:

Q. When did John Ware begin working for your company?

A. He had worked for me off and on for about a year. He was a part-time employe.

Q. Did he make a good man for you?

A. Good man, yes, sir.

Q. You knew John very well, didn't you?

A. I knew John, yes, sir.

[fol. 272] Q. Do you know or think you know his general reputation among his friends, neighbors and acquaintances for truth and veracity?

A. Yes, I think he was the average. He wasn't a big story-teller.

Q. You say you know his reputation?
A. I think he had a very decent reputation among his friends, as far as I know.
Q. And you say his reputation is good?
A. As far as I know.
Q. From that reputation would you give his testimony full faith and credit in a Court of Justice where he was testifying in his own behalf?
A. Yes, I would.
Q. Mr. Quinn, you paid off out there by check?
A. Yes, sir.
Q. John Ware endorsed his checks, didn't he?
A. I suppose so.
Q. You have seen returned checks with John Ware's name endorsed on the back of the checks?
A. I don't remember seeing any.
Q. That's not in your department?
A. No, sir.

Mr. McCormick: That's all.

(Witness excused)

[fol. 273] HERBERT TUCKER sworn and testified as follows:

Direct examination.

By General Gerber:

Q. State your name, please, sir?
A. Herbert Tucker.
Q. Where are you employed?
A. Federal Clothing Stores.
Q. How long have you been so employed in Memphis?
A. I have been here two years now.
Q. Have you a ledger?
A. Yes, sir, here it is.
Q. Look in that book and tell us whether or not, in June of 1941, you had an account with Tom Ware?
A. Yes, sir.
Q. What was his address at that time?
A. 1547 Sunset.
Q. When was that account opened up?
A. April 5, 1941.

Q. Tell us, please, sir, whether any payments or any purchases were made on June 9, 1941?

A. Yes, sir, there was a payment made and a purchase on that date.

Q. Tell us what was purchased on that day?

A. A pair of men's shoes and men's pants.

Q. How much of a payment was made on that day?

A. Two dollars and ninety cents.

General Gerber: If your Honor please, we want to offer that entry as exhibit #1 to the testimony of this witness. [fol. 274] The Court: Very well.

(Exhibit #1 Tucker received in evidence)

General Gerber: You may take the witness.

Mr. Bickers: No questions.

Cross examination.

By Mr. McCormick:

Q. In this book you have it marked that he paid $1.00 on June 9?

A. He paid $1.00 and then $1.90.

Q. The shoes and pants were added to the account, charged?

A. Yes, sir.

Q. What did the pants cost?

A. I believe $9.95.

Q. And the shoes?

A. $6.95.

Q. And on the same day that he charged these items he paid $1.00 and $1.90?

A. Yes, sir.

Mr. McCormick: That's all.

(Witness excused).

[fol. 275] W. H. GATCHELL the next witness, sworn and testified as follows:

Direct examination.

By General Gerber:

Q. State your name to the Court and jury, please?
A. W. H. Gatchell.
Q. You are connected with what concern?
A. U. P. National Bank as Assistant Cashier.
Q. You have been with that bank how long?
A. 17 years.
Q. I will ask you to state if in June of 1941 there was a savings account in that bank in the name of Mr. and Mrs. E. E. Ashcraft?
A. Yes, sir.
Q. Was there also a commercial account opened on May 31, 1941 to Mr. or Mrs. E. E. Ashcraft?
A. Yes, sir.
Q. I want to show you a bank book that has previously been introduced as an exhibit to the testimony of Mr. Mateer, exhibit "S" and ask you if that is the book covering the savings or commercial account?
A. Savings account.
Q. Do you have your ledger sheet with you?
A. Yes, sir.
Q. Look at your ledger sheet and tell me whether the entries on that book are identical with the ledger sheet?
A. Yes, they are.
Q. Tell the jury what the balance was to that account as of June 5, 1941?
A. $3,034.36.

[fol. 276] Q. And I believe the book shows a deposit in that savings account on May 31, 1941 of $1,000.00?
A. Yes, sir.
Q. I show you another book. What is that?
A. Commercial pass book.
Q. Was there an account opened to the credit of Mr. and Mrs. Ashcraft as shown by that commercial pass book?
A. There was, on May 31, 1941 in the amount of $600.00.
Q. Have you the ledger sheet of the commercial account which shows that deposit of $600/00?
A. Yes, sir.

General Gerber: We want to introduce both books.

(Exhibits A and B—Gatchell received in evidence.)

Q. Now, in order to draw any money out of the savings account, state to the jury whether it is compulsory that the depositor produce the bank book at the time of such withdrawal?

A. We can pay the money without the pass book provided we pay it directly to the person in whose name the account is registered.

Q. If a check was given on this account and someone wanted to cash that check, you wouldn't cash it without the pass book?

A. Not at all.

Q. That is not true of course as to the commercial account?

A. No, sir.

General Gerber: That is all.

Cross examination.

By Mr. Bickers:

Q. When was that savings account opened?

A. November 8, 1937.

[fol. 277] Q. In that ledger there are deposits made from time to time from 1937 to June 5, 1941?

A. Yes, sir.

Q. Those were joint accounts?

A. Yes, sir.

Q. That simply means that either one of the parties can draw the money out?

A. Yes, sir.

Mr. Bickers: That is all.

(Witness excused.)

[fol. 278] Nelson Burton sworn and testified as follows:

Direct examination.

By Mr. Gerber:

Q. Will you state your name to the court and jury?

A. Nelson Burton.

Q. You are in what business, please?

A. Life Insurance, Life and Casualty Insurance Co. of Tennessee.

Q. I will ask you if in 1941 there existed any life insurance policies in your company on the life of a woman by the name of Zelma Ida Asheraft?

A. Yes, sir, there did.

Q. I will ask you if you have in your hand original policy No. V-5025068?

A. Yes, sir.

Q. Who was the insured under that policy originally?

A. Zelma I. Balentine.

Q. When was that policy originally issued?

A. July 20, 1925.

Q. At any time after the policy was issued to Zelma I. Balentine—before I get to that, who was the original beneficiary?

A. Tennie Pierson, the mother of the insured.

Q. At any time after that policy was issued was the beneficiary changed?

A. Yes, on February 12, 1934 the beneficiary was changed and Eddie E. Asheraft was made beneficiary.

Q. Was he the beneficiary under that policy on June 5, 1941?

A. Yes, sir.

[fol. 279] Q. State whether or not that was a double indemnity policy?

A. Yes, sir, it was. The face of the policy was to be doubled in case of accidental death.

Q. I will ask you if you had another policy on this woman, No. S-4706044?

A. Yes, sir, we did.

Q. Who was the insured under that policy originally?

A. Zelma I. Balentine. That was issued January 26, 1935.

Q. Who was the beneficiary under that policy?

A. Tennie Pierson, mother of the deceased.

Q. Was that beneficiary ever changed?

A. Yes, sir.

Q. Who was the beneficiary on June 5, 1941?

A. Eddie E. Asheraft.

Q. What was the amount of that policy?

A. $465.00.

Q. What was the amount of the other policy?

A. One thousand dollars.

Q. And in the event of accidental death that paid $2,000.00?

A. Yes, sir.

Q. I will ask you if, after the death of Mrs. Zelma I. Ashcraft, your company paid any money to the administrator of her estate?

A. We did.

Q. Is this a photostat copy of the check issued at that time?

A. Yes, sir.

Q. It was issued to whom?

A. J. S. Shields, administrator, on August 13, 1941.

Q. In what amount?

[fol. 280] A. $2105.00. On the $1,000.00 policy, there was $2,000.00 paid and the other policy had lapsed for non-payment of premiums, but there was paid up insurance in the amount of $105.00.

General Gerber: We want to offer the insurance policies and the check in evidence. The insurance policies have previously been introduced as Exhibits "I" and "J" to the testimony of Mr. Becker.

The Court: Let them be marked.

(Exhibits A, B and C Burton received in evidence.)

General Gerber: You may take the witness.

Cross-examination.

By Mr. Bickers:

Q. You say one of those policies had lapsed before her death?

A. Yes, sir, the smaller one.

Q. When you testified that this money was paid to the administrator of Mrs. Ashcraft's estate, that's as far as you know as to the distribution of the money?

A. With this one exception: there was an order to pay certain funeral expenses, to the administrator.

Q. You have no record of that money having left the hands of the administrator?

A. No, sir, except to the funeral home.

Q. Both these policies were taken out in 1925?
A. Yes, sir.

Mr. Bickers: That is all.

(Witness excused.)

[fol. 281] GEORGE PRYOR (Colored) sworn and testified as follows:

Direct examination.

By General Gerber:

Q. State your name to the court and jury?
A. George Pryor.
Q. Where do you work?
A. Hartwell Brothers Handle Factory.
Q. You have been there how long?
A. Going on seven years now.
Q. Were you working there on June 15 and 16, 1941?
A. Yes, sir.
Q. Where were you living on Sunday night and early Monday morning of June 15 and 16, 1941?
A. 1530 Oriole Street.
Q. I want to ask you if at any time on Sunday night, June 15, 1941, or the early morning of June 16th, Monday morning, sometime after midnight, anybody came to your house and woke you up?
A. Yes, sir. It was about one or two o'clock. Me and my wife was in bed sleeping and someone knocked on the door and my wife woke me up and told me that someone was knocking on the door. I went to the door and ask who was it and they said they was the law, for me to get up and open the door. I got up and opened the door and these two men come in. When they came in one of them asked me what was my name and I told them George Pryor. He said "where do you work?" and I said "Hartwell Brothers," and he asked me who lived with me and I told him nobody but my wife, and by that time one of the men said to another "bring him in." They brought a man to [fol. 282] the door and one of the officers said "Is this the boy?" The man said "no." He said "Where do Tom Ware live?" and I said "I don't know, and he said "he lives at 1534 Oriole" and my wife says "This is 1530; 1534

is next door" and my wife said "there is a Ware lives there."

Q. Did they leave then?

A. Yes, sir.

General Gerber: Take the witness:

Mr. Bickers: No questions.

Cross-examination.

By Mr. McCormick:

Q. It scared you pretty bad?

A. No, sir, not right at the present time. After they was gone me and my wife wondered what was the matter. I never had nobody get me up at that time of the night before.

Mr. McCormick: That's all.

(Witness excused.)

[fol. 283] Ella Pryor (Colored) sworn and testified as follows:

Direct examination.

By General Gerber:

Q. State your name to the court and jury, please?

A. Ella Pryor.

Q. You are the wife of George Pryor who just testified?

A. Yes, sir.

Q. Where were you living on Sunday night, June 15th or the early morning of Monday, June 16, 1941?

A. 1530 Oriole Street.

Q. Do you remember some deputy sheriffs coming to your house on that night?

A. Yes, sir.

Q. What happened?

A. About midnight some men knocked on the door and I woke my husband and told him somebody was at the door and he asked who it was and they said the law and they asked him where he worked and he told them, and what his name was and they wanted to know if a boy lived there by the name of Ware and he said he didn't know no boy by that

name, and I told them there was a Tom Ware that lived next door and they left.

General Gerber: That's all.
Mr. McCormick: No questions.
Mr. Bickers: No questions.

(Witness excused.)

[fol. 284] Mrs. William A. Waterbury sworn and testified as follows:

Direct examination.

By General Gerber:

Q. State your name to the court and jury, please?
A. Mrs. William A. Waterbury.
Q. You are the wife of Mr. William A. Waterbury who has previously testified in this case?
A. Yes, sir.
Q. Where do you live at this time?
A. Near Raleigh.
Q. With reference to the slough or pool of water where Mrs. Asheraft's body was found, how far do you live from that?
A. About 250 yards north of the slough.
Q. You have been living there how long?
A. Around 17 years.
Q. On the night of June 4 and early morning of June 5, 1941, where was your husband employed?
A. Firestone Tire and Rubber Company.
Q. Do you remember about what time he came home on the early morning of June 5, 1941?
A. Around 2:30.
Q. At that time state whether or not there was anything wrong with him?
A. He had a cyst on the back of his neck and I dressed it before he went to bed.
Q. After you dressed that cyst, did you then go to sleep?
A. I didn't go to sleep at that time.
[fol. 285] Q. At anytime after that, I will ask you to state if you heard anything down in the direction of that slough?
A. Yes, I heard two screams. They sounded as if someone was in terror and they were rather muffled.

Q. What time did you hear those screams?
A. It must have been around three o'clock or after.
Q. About thirty minutes after your husband came home?
A. That's true.
Q. When was the first time you made known to the sheriff's office about what you have testified to?
A. The latter part of June, 1941.

General Gerber: You may take the witness.
Mr. McCormick: No questions.
Mr. Bickers: No questions.

(Witness excused.)

Juror: I would like to know the dates of the deposits and withdrawals on the savings account—not on the commercial account.

The Court: Some of these exhibits have been handed to you. Some of them, on account of their size, have not; but if you want to see any of these exhibits, ask for them and they will be handed to you. We will recess until 2:00 o'clock.

Recess.

[fol. 286] (Court reconvened at 2:00 o'clock of the same day when and where the following occurred)

Mr. T. A. Lanigan sworn and testified as follows:

Direct examination.

By General Gerber:

Q. State your name, please?
A. T. A. Lanigan.
Q. What is your business?
A. Deputy County Register of Deeds, Shelby County, Tennessee.
Q. You are the custodian of the warranty deeds that are registered in the registers office?
A. Yes, sir.
Q. I will ask you if you have a record of a piece of property conveyed to Mr. and Mrs. E. E. Ashcraft in 1939 out on Stanton Road, here in Shelby County, Tennessee?
A. I have.

Mr. Bickers: For the sake of facilitating matters, I will admit the deed——

General Gerber: We just want to show it for the record.

Q. What was the tax on that property?
A. They paid taxes on $1500.00.
Q. What day was that conveyance made?
A. The blank day of June, 1939.

General Gerber: I want to introduce this sheet in evidence and at the proper time have photostat substituted.

The Court: Any objection?

[fol. 287] Mr. Bickers: No.

(Sheet marked Exhibit #1 Lanigan.)

Q. Tell us the number of the book you are reading from?
A. 1637, warranty deeds.
Q. I will ask you if that piece of property was in the name of E. E. Asheraft and his wife, Zelma I. Asheraft, on June 5, 1941?
A. Yes, sir.
Q. Look in your record book and tell us if you find any other conveyance to the same parties?
A. Yes, sir, here is a lot.
Q. What is the value of that lot?
A. They paid taxes on $200.00. That's book 1644.

General Gerber: We offer that page also with permission to substitute photostat.

The Court: Very well.

(Exhibit #2 Lanigan marked.)

Mr. Bickers: No questions.
Mr. McCormick: No questions.

(Witness excused.)

[fol. 288] Dr. Dempsey B. Morrison sworn and testified as follows:

Direct examination.

By General Gerber:

Q. Will you state your name to the Court and Jury, please, sir?
A. Dempsey B. Morrison.

Q. Doctor, you are connected with what institution?

A. Tennessee College of Medicine.

Q. You have been with the University of Tennessee how long?

A. Since 1928.

Q. Do you specialize in any kind of work?

A. Physiological chemistry.

Q. Where did you receive your education, doctor?

A. University of Oklahoma for undergraduate work and State University of Iowa for graduate work.

Q. I will ask you if in June of 1941, Dr. Rigdon delivered to you certain tissue and certain organs from the body of one Zelma Ida Ashcraft for the purposes of analysis?

A. He did.

Q. What analysis were you to make of that tissue?

A. To determine whether there was amytal present.

Q. Did you determine by analysis whether there was any amytal in that tissue or those organs?

A. I did.

Q. I will ask you to state to the jury how much of that tissue or how much of the organs delivered to you was used in making this analysis?

A. There was three and 72/100 pounds of tissue, plus [fol. 289] some blood and I used all of it and I obtained 1½ millograms of amytal.

Q. Will you state to the jury whether, from the amount of tissue and organs and fluid that you examined, and the amount of amytal you found, whether that particular person, prior to death, had taken large or small quantities of amytal?

A. It is presumed that she did.

Q. Did what?

A. Take a very large dose because that drug is known to be destroyed very rapidly in the body.

Q. The amytal when taken is destroyed very rapidly?

A. Fairly.

Q. And did you also take into consideration the fact that you examined this tissue on June 12th and that this body was found on June 5th?

A. I believe that's the approximate date. It is about that length of time.

Q. Is that also taken in your calculation to determine whether there was a large or a small quantity of amytal taken prior to death?

A. I don't know about that point, but the drug is destroyed rapidly in the tissue.

Q. Doctor, what is amytal?

A. It is a barbituric acid derivative. It will act as a sedative, producing sleep if taken in large amounts.

Q. Doctor, I will ask you if at any time amytal has been used as an anaesthetic?

A. It has.

[fol. 290] Q. State if amytal taken in required quantities would place the person taking it in such condition that that particular individual could be moved from one place to another without waking?

A. Yes, sir.

General Gerber: You may take the witness.

Mr. Bicker: No questions.

Mr. McCormick: No questions.

(Witness excused.)

General Gerber: The State rests in chief.

State Rests in Chief

Mr. Bickers: I would like for the Jury to be excused.

The Court: All right, gentlemen, you may step out.

Jury Out

Motion For Directed Verdict

Mr. Bickers: May it please the Court, at this time we ask the Court to instruct the Jury to return a verdict of not guilty on behalf of the defendant E. E. Ashcraft, on the ground, first, that there is absolutely no evidence here that remotely connects him with this crime, at this stage of the proceedings. The state has closed its proof. There is no rebuttal testimony that could possibly be offered at this time that would correct their apparent lack of proof that I think your Honor would let stand if there should be a conviction in this case.

Second, I move that the court instruct the jury that they must and should disregard any testimony by the witness Becker or the witness Waldauer that remotely connects,

by word or repeating of conversation, the defendant E. E. [fol. 291] Ashcraft. I move the court to strike from the record, and instruct the jury to disregard, any and all proof here by the witnesses for the State that has to do with information that they obtained from the defendant Ashcraft from the time of his arrest and being brought to the jail—June 14th I think— from that time, when he was in the care and custody of the chief of the homicide squad and the first assistant attorney general of Shelby County and all other officers connected with him, from that time, that it, 7:00 o'clock on the night of the 14th of June.

Third, that the undisputed record shows now that this defendant was placed on the 5th floor in a cell of the county jail of Shelby County and there kept sitting at the end of a table with two officers, one on each side of him for a period of *of* thirty-six hours.

Therefore, I respectfully submit to the court that any oral statement that he might have made could not have been freely and voluntarily made and that it could not have been free of coercion. That from the record as it stands now, the defendant Ashcraft couldn't have acted of his own volition and couldn't have freely and voluntarily made a statement that could be construed as being binding on him. I respectfully submit that the court instruct the jury to bring in a verdict of not guilty in his behalf. Do you want argument or just my motion?

The Court: That's up to you, Mr. Bickers.

Mr. Bickers: I have got an idea down in my system that you are going to overrule it, but I want to say now that there isn't a scintilla of evidence in this record at this time that would uphold a conviction in this case. That's my motion. [fol. 292] The Court: Your motion, Mr. Bickers, will be overruled.

Note your exception.

Mr. Bickers: Note my exception.

Motion to Strike, etc.

Mr. McCormick: May it please your Honor, I move that all evidence relating to a so-called confession, and the paper-writing evidencing a confession of John Ware, be stricken from the record upon the ground that the evidence does not show that it is a free and voluntary confession on the part of John Ware. I again move that it be stricken

from the record and the jury instructed to consider it for no purpose, upon the ground that the facts surrounding its taking show conclusively a violation of the constitutional rights of the defendant Ware, both under the constitution of the State of Tennessee and the constitution of the United States, and particularly to the due process clause, as we know it, of the 14th Amendment to the Constitution of the United States.

I again move that it be stricken from the record, both oral and written, the alleged confession, upon the ground that the uncontradicted proof shows that John Ware, on the 5th floor of this jail, and in the confession chamber, as the Supreme Court of the United States designates it in this case, was there tried by a quasi-judicial tribunal, convicted and this instrument to which we are now objecting, taken by learned counsel representing the State, he being there present, and by the officers of this County, he being there not represented by counsel or with any friends there at all, and I say to this honorable Court that that is an illegal proceeding from beginning to end and unknown to [fol. 293] any legal procedure in these United States of America, valid legal procedure, and that John Ware should not be put to trial by a jury, and that as a matter of law this Court should place its stamp of disapproval on that procedure and declare it illegal from beginning to end. I say that the law is, before a man can be convicted of a crime, he must come down here in this court room and not be tried in secret chambers in this jail, at midnight. There is no competent or credible evidence of fact to go to the jury and I move that your Honor take the case from the jury and instruct them to return a verdict of not guilty. That's my motion.

Mr. Bickers: I want to add this to my motion, for the record: that there is no evidence against the defendant Ashcraft at this time which would warrant this case going to the jury; that any evidence against him was obtained by violence in contravention of his constitutional rights both under the constitution of the United States and the State of Tennessee; further, that the questions raised in my motion have already been adjudicated by the Supreme Court of the United States in this same case.

Mr. McCormick: Just one other ground: I move again that the Court take this case from the Jury and decide it in

favor of the defendant Ware, upon the ground that the Supreme Court of the United States and the Supreme Court of Tennessee have declared the confession of John Ware, against him in this case and I particularly call the Court's attention to the opinion of the Supreme Court of Ten- [fol. 294] nessee, on its mandate sending this case back to this Court for consideration and disposition not inconsistent with the opinion of the Supreme Court of the United States. Your Honor is familiar with what is in this mandate.

General Gerber: We urge upon the Court that motion of counsel should be denied.

The Court: I will act first on Mr. McCormick's motion, since that was the first motion.

Mr. McCormick: You mean Mr. Bicker's motion.

The Court: No, I acted on Mr. Bicker's motion and then you made a motion and before I had an opportunity to pass on your motion, Mr. Bickers made a second motion.

Mr. Bickers: I added to my previous motion.

The Court: You made the amendment to your other motion before I had a chance to pass on the motion of Mr. McCormick. It is the opinion of the Court, Mr. McCormick, that your motion should be overruled. Also the amended motion of Mr. Bickers is overruled.

Mr. McCormick: Note my exception.

Mr. Bickers: Also note my exception. I would like to announce at this time that the defendant E. E. Ashcraft will not take the witness stand. As I understand the procedure, Mr. McCormick must go on with his proof before I proceed with my proof.

The Court: Very well. Mr. McCormick, do you wish to proceed or do you want to confer with your client?

[fol. 295] Mr. McCormick: Will you give me about five minutes?

The Court: Yes, sir, longer if you like.

(Recess.)

Jury In

JOHN WARE, one of the defendants, being sworn testified as follows:

Direct examination.

By Mr. McCormick:

Q. State your name?
A. John Ware.
Q. How old are you, John?
A. Twenty-three.
Q. In June, 1941 how old were you?
A. Twenty.
Q. What month is your birthday?
A. This month, November.
Q. November, 1941 you were 20 years old?
A. Yes, sir, that's right.
Q. John——
A. Yes, sir.
Q. —you are charged in this indictment with having murdered Mrs. Ashcraft. Are you guilty or not guilty?
A. Not guilty.
Q. Did you know Mrs. Ashcraft during her lifetime?
A. No, sir, don't know her now.
Q. Did you know that Mr. Johnny Ashcraft had a wife?
A. No, sir, I didn't.
Q. Where were you born, John?
[fol. 296] A. I was born out here in Bartlett on Mr. Jessie Appling's plantation.
Q. Your father is John Ware?
A. Yes, sir.
Q. And your mother was sitting by you here for a little while the other day?
A. Yes, sir.
Q. Her name is Willie Ware?
A. Yes, sir, that's my mother.
Q. Do you have any brothers or sisters?
A. Yes, sir, ten—nine sisters and brothers; five boys and five girls; with myself it makes ten.
Q. John, how long did you live in and around Bartlett?
A. Well, my father he moved away from there in 1927 or 1928.
Q. You were at that time a little boy nine or ten years old?

A. Yes, sir.
Q. Where did your father move to?
A. Friar's Point, Mississippi, Mr. McKee's plantation.
Q. Is that a plantation owned by Mr. Lytell McKee?
A. Yes, sir, him and his brother.
Q. Did you grow up on that plantation?
A. Yes, sir.
Q. In 1937 what happened around Friar's Point?
A. In 1937 there was an awful high water and my father moved from there back to Memphis and I came here and then went back. The levee broke down there. I worked on it. It broke and washed my father out, then I come to Memphis.
[fol. 297] Q. Did any of your brothers or sisters remain on the plantation?
A. My oldest sister did.
Q. And you came here——
A. Yes, sir, and stayed two days and went back.
Q. Did you know Mr. Lytel McKee while you worked on the plantation?
A. Yes, sir, I worked for them about all my life night and day.
Q. Did you drive Mr. McKee's car?
A. No, sir, I took care of the mules and horses.
Q. Did you make a crop there next year after the high water?
A. Yes, sir, in 1938.
Q. Where did you move after 1938?
A. I stayed there all of 1938 and 1939 and my father's brother, I "hope" him make a crop in Robinsonville, Miss.
Q. That was 1939?
A. Yes, sir.
Q. When did you come back to Memphis?
A. I came here to live in 1940 when they opened that powder plant at Millington.
Q. Did you go to work immediately at the powder plant?
A. Yes, sir. They had just begin to survey the place.
Q. How long did you work at the powder plant?
A. Right at 12 months.
Q. Did you work regularly there?
A. Worked every night until it was completed, Sunday and all.
Q. That carried you up to January or February of 1941?
A. Along about that time, I just don't remember exactly.

Q. Where did you go to work after leaving the powder plant?

A. I was out of work for a while, it wasn't long and then [fol. 298] I went to work for Hogan Construction Company on Bellevue on the sea wall.

Q. That's the sea wall they build along the levee? That big embankment?

A. Yes, sir.

Q. Who was your boss there?

A. Mr. Smith. Mr. Smith or Mr. Schmitty.

Q. Then where did you go?

A. On Cleveland Street, what they call the bowling alley.

Q. Who sent you over there?

A. Mr. Bill Turner.

Q. Was Mr. Bill Turner foreman for Mr. Smith of the Hogan Construction Company on the sea wall job?

A. Yes, sir, he hired me.

Q. Did he take any other employes from the sea wall job over to the bowling alley job?

A. Yes, sir, he taken me and three other boys.

Q. Up until that time did you ever know Mr. Johnny Ashcraft?

A. No, sir, I did not.

Q. John, have you ever been in any trouble in your life before this?

A. Yes, sir; I was here, we had caught up work in Mississippi and I came here to see my mother and I was in one of Mr. Parker's trucks and was with a white boy I knew and he stopped the truck on Bristol Highway and bought some whiskey and he and the other boy they were drunk and when we got to Brownsville they arrested us for disorderly conduct.

Q. They put you in the calaboose up there?

A. Yes, sir.

Q. Were you ever in trouble in Mississippi?

[fol. 299] A. Yes, sir, I was picked up in Clarksdale, Mississippi and I wasn't kept in jail no longer than I could identify myself and where I come from.

Q. How long did that take?

A. About a day or two.

Q. They picked you up and found out you worked for Mr. McKee and then released you?

A. Yes, sir.

Q. Were any charges placed against you?

A. No, sir.

Q. No fine was paid by you?

A. No, sir, I was just released. I knew the people at Clarksdale; I knew Mr. Greek Rice.

Q. He was the Attorney General?

A. Yes, sir, my sister used to cook for him.

Q. All right. Now, you went over to work on this bowling alley job?

A. Yes, sir.

Q. What kind of work were you doing?

A. Laborer.

Q. Pick and shovel man?

A. Yes, sir.

Q. Was Mr. Johnny Ashcraft there then?

A. No, sir, not when I first went there. There wasn't but one white man there—Mr. Bill Turner.

Q. John, tell the jury how you came to know Mr. Ashcraft?

A. Yes, sir, I will. Well, it came a little rain one evening and we got paid off. It was on a Tuesday or Wednesday [fol. 300] and it was raining and I was on Mr. Bill Turner's truck out of the rain and I didn't have no money except my check and I asked Mr. Bill Turner which way did he go home and he said "I go south" and I was directed by Mr. Bill to ask Mr. Johnny for a ride and I asked him did he live my way and could I ride with him and Mr. Johnny said if I got some mud off me I could ride. So I got the mud off my clothes and shoes and rode with him to Chelsea and Oriole Street.

Q. Were you living close to Chelsea and Oriole then?

A. Yes, sir, the 5th house off of Chelsea.

Q. When you get off at Chelsea, can you look up and see your house from there?

A. Yes, sir.

Q. What did you do when you got to Chelsea and Oriole?

A. I told Mr. Johnny that I lived up the street and he let me out.

Q. You got out there?

A. Yes, sir, and I thanked him and told him if he would let me go and get my check cashed I'd give him seven cents, and he said "That's all right, you don't make enough to pay me," and he asked me what time I was due at work in

the morning and I told him and he said "I'll be along here about 7:20 and if you're along here you can ride with me.

Q. What if any conversation did you have with Mr. Ashcraft from the time you got in his car at the bowling alley until he let you out at Chelsea and Oriole?

A. It wasn't any conversation. I thanked Mr. Johnny, said about three or four words. He just spoke about how it was raining.

Q. And you didn't talk to him?

[fol. 301] A. No, sir.

Q. Now, John, can you tell is about when it was, with respect to time, that you were picked up and brought here? How long before that was the first ride you had?

A. That was before Easter.

Q. That was in April?

A. Yes, sir.

Q. How long did you work on the Cleveland Street job, the bowling alley job?

A. I made two "six days", which was two weeks.

Q. You made two weeks consisting of six days each?

A. Yes, sir.

Q. Did they then finish your part of the job?

A. Yes, sir.

Q. And on that first ride home with Mr. Asheraft, he told you that if you happened to be on the side of the road when he passed going to work he would be glad to pick you up?

A. Yes, sir.

Q. Did you ride with him the next morning?

A. Yes, sir, but where he picked me up was at the car line; it was where the car turns round; I was on my way to get the street car when he comes by. We was under the shed when I saw him. Then he stopped and picked me up.

Q. How many times while you were working at that place in April, before Easter, did you ride with Mr. Asheraft to or from work?

A. I rode back to work with him the morning after he picked me up and he picked me up another evening on another day.

[fol. 302] Q. Did you ride back with him the same day he picked you up, or another day?

A. I believe it was another day.

Q. What if any conversations did you have with Mr. Asheraft during the three times you rode with him?

A. No conversations.

Q. After you finished your work at that plant on Cleveland Street, where did you go?

A. Mid-South Concrete Pipe Company.

Q. And that's the place where Mr. Quinn works?

A. Yes, sir, he is the superintendent.

Q. Were you working at that place when you were picked up?

A. Yes, sir.

Q. From the time you left the bowling alley job on Cleveland Street up until the time you were picked up and brought down here to this jail, did you ever see Mr. Ashcraft?

A. No, sir, I didn't.

Q. At the time you were picked up and brought to this jail did you know Mr. Johnny's last name?

A. No, sir, I learned his name since I have been in jail.

Q. What did you call him?

A. Mr. Johnny.

Q. Around midnight on June 15th did anybody come to see you?

A. Yes, sir, a carload of white mens.

Q. Did they knock on your door?

A. No, sir, it is a wooden door and was open and the screen had a hook and they just busted the hook off and come on in.

Q. What did they say to you?

[fol. 303] A. They shined a light on my bed and told me to get up and I got up.

Q. What affect did that have on you, John?

A. Well, that scared me.

Q. How many men were there?

A. I don't know, sir.

Q. Did you ever have anything like that happen to you before?

A. Never in my life.

Q. Were you asleep?

A. Yes, sir.

Q. What did you ask these men?

A. I asked them what they was getting me for.

Q. What did they say?

A. They said I would find out.

Q. And you did find out, didn't you?

A. Yes, sir.

Q. Did they take you out to the car?

A. They ordered me to dress first before that. After I was gotten out of bed I was ordered to dress and I did so and after I was dressed I was handcuffed and ordered out of the house.

Q. What if anything happened to you then?

A. When I got out of the door and was coming down the steps I was struck.

Q. Do you know who hit you?

A. No, sir.

Q. Were you hit a hard lick?

A. I have never been hit that hard before in my life.

Q. How did they get you in the car?

[fol. 304] A. One of them held me by the belt.

Q. Then they put you in the car and brought you to the jail?

A. Yes, sir.

Q. Where were you taken when they brought you to the jail?

A. Taken to the 5th floor of this building.

Q. When you were taken up was Mr. Asheraft in the elevator?

A. Yes, sir, all of us.

Q. All of you went to the 5th floor?

A. Yes, sir.

Q. Then where did they take you?

A. In a room there.

Q. Was Mr. Asheraft up there?

A. He was facing me outside the lobby.

Q. What if anything was said by any of the officers, or anybody, about Mr. Asheraft?

A. They asked me did I know him, and I said "Yes, sir, I know him by his face."

Q. Did you know him by his name?

A. By the name of Mr. Johnny.

Q. Did you tell them that was Mr. Johnny?

A. Yes, sir, I did.

Q. What if anything did they say to you about his last name?

A. They told me didn't I know that was Mr. Johnny Asheraft and I said Mr. Johnny was the name I knowed him by.

Q. Did you say to them or to Mr. Asheraft, "Mr. Johnny I told you if we got in trouble out of this I wasn't going to take the whole blame?"

A. No, sir.

[fol. 305] Q. You deny that?

A. Yes, sir.

Q. Was that all they said to you—if you knew Mr. Asheraft?

A. That was all they said to me and then I was taken away from Mr. Asheraft and Mr. Becker charged me with killing Mrs. Asheraft.

Q. That took place in the lobby?

A. Yes, sir.

Q. Was Mr. Asheraft ever in that room with you?

A. No, sir.

Q. Mr. Asheraft was taken somewhere else?

A. When I saw Mr. Asheraft again it was way up in that day.

Q. That was about midnight?

A. It was night and when I saw him again it was way up in the day.

Q. They took you in this little room you say?

A. Yes, sir.

Q. Who went in there with you?

A. Mr. Becker and Mr. Jayroe and Mr. Ezell. I didn't know their names at that time.

Q. Mr. Battle wasn't there then?

A. No, sir, but he come in later.

Q. What did they say to you when they took you to that room? What was in the room?

A. There was a table and a water sink and a big light and a lot of other things.

Q. Picture-taking instruments?

A. I don't know what they were.

Q. What did they say to you?

A. When Mr. Becker come in he give me a seat at a table and I sat down and he was on one side and Mr. [fol. 306] Jayroe was on the other and Mr. Ezell on the other and Mr. Becker asked me what I wanted to kill Mr. Asheraft's wife for and I told him I didn't kill nobody.

Q. What did he say to you?

A. He told me I was a damn lie. I told him I didn't do it. I told him I didn't know anything about it. I told him I didn't know Mr. Johnny had a wife. I said "I rode

home to my home from work with him and that's all I did do."

Q. How did Mr. Becker treat you?

A. He treated me mean. From that night until Mr. McTigue come up there.

Q. Did he strike you?

A. Yes, sir.

Q. Why did he do that?

A. Because I denied the charge he put against me. He said "You're telling a damn lie."

Q. Did he use any worse language than that?

A. Yes, sir.

Q. All right, what did he say?

A. He said "You know you're telling a God damned lie," and I said "no, sir, I'm not," and he cursed me and then they taken me out of the room.

Q. Did he call you a "S. O. B?"

A. I don't know what that is.

Q. Did he call you a son of a bitch?

A. Yes, sir, he did.

Q. You say they then took you out of that room?

[fol. 307] A. Yes, sir.

Q. Where did they take you?

A. Put me back on the elevator that I came up on and took me down to a dungeon.

Q. What did they say to you when they put you in the dungeon?

A. They say if I didn't say I killed that woman they would turn me over to a mob.

Q. How big is that dungeon?

A. I can't estimate it. It wasn't big enough to stand up straight in. It's about that wide, (illustrating).

Q. Was it dark in there?

A. Yes, sir, the onliest light you could see was from a window.

Q. John, were you afraid of that mob?

A. Yes, sir, I sure was.

Q. Do you know what a mob is?

A. Yes, sir, I saw one once.

Q. Were you afraid they were going to turn you over to a mob?

A. Yes, sir; they said "You know what happens when a nigger kills a white woman."

Q. Do you know how long you stayed in that place?

A. It wasn't long.

Q. You say you were scared?

A. Yes, sir, I absolutely was.

Q. Did you cry?

A. Yes, sir, I did.

Q. Did they come back and get you?

A. Yes, sir, the same two, and put me on the elevator.

[fol. 308] Q. What did they ask you?

A. They said they were going to turn me over to a mob, and I asked them what did they want me to tell them, and he said to tell that I killed Mr. Johnny's wife. I said "If that's what you want me to say I'll say it."

Q. Who brought up this business about Mrs. Asheraft being killed?

A. I don't know.

Q. Did you?

A. No, sir, because Mr. Johnny never hired me to do anything for him.

Q. John, did you have anything to do with killing Mrs. Asheraft?

A. No, sir. I didn't absolutely. That's the God's truth and to my Judgment day I'll say I didn't. No, sir, I don't know anything about it. That's the truth if I ever told it.

Q. Did you tell Mr. Becker that you killed this lady?

A. Yes, sir, I did when they said they would turn me over to a mob if I didn't.

Q. How long did Mr. Becker talk to you in that room before Mr. Waldauer came in with his little tablet like Mr. Combs has there?

A. I didn't have no watch and I don't know how long.

Q. Was it quite a long while?

A. Yes, sir.

Q. You went over this whole thing before Mr. Waldauer got there?

A. No, sir, I never went over nothing with him. I just told him I did it and he asked me a lot of questions.

Q. Then Mr. Waldauer was called in?

A. Yes, sir.

Q. Mr. Waldauer says it was about 2:10. Is that about right?

[fol. 309] A. I don't know, sir.

Q. When he asked you these questions, what did you say?

A. When he would ask me a question, did you do that, I would say "yes, sir."

Q. Was Mr. Battle in there with Mr. Becker?
A. Yes, sir.
Q. You were in there alone with Mr. Battle and Mr. Becker?
A. Yes, sir, I was.
Q. John, I notice in this statement Mr. Becker asked you how you killed this lady?
A. Yes, sir, he did.
Q. When he first asked you that, what did you tell him?
A. I told him I shot her, and he said "You are a damn lie; you know you knocked that woman in the head."
Q. Did he then tell you that she wasn't shot?
A. He told me she was knocked in the head.
Q. And then he asked you if you knocked her in the head with a rock and you said yes?
A. Yes, sir.
Q. Did you know at that time whether she had been shot or how she was killed?
A. No, sir, I don't know now.
Q. After Mr. Waldauer got through taking this statement where were you taken?
A. I was taken over to a small room and then I was put in jail.
Q. Was this written instrument brought up there to you?
A. They brought something to me.
Q. Was a statement brought to you?
A. Yes, sir.
[fol. 310] Q. They read it to you?
A. Yes, sir.
Q. And asked you to sign it?
A. Yes, sir.
Q. Did you sign it?
A. No, sir.
Q. Why?
A. Because I knowed it wasn't true and I thought there wouldn't be anything to it if I didn't sign my name to it.
Q. Could you write your name?
A. Yes, sir, I can write my name.
Q. Could you write your name at that time?
A. Yes, sir.
Q. You say you thought if you didn't sign it there wouldn't be anything to it—it wouldn't be worth anything?
A. That's right.

Q. John, I am going to let you write your name. Just write it on this paper. You were paid off by checks by your employer?

A. Yes, sir, I was.

Q. Did you endorse those checks?

A. Every one of them I drew.

Q. Get down off the stand, John, and write your name, two or three times.

A. (Witness writes on paper.)

Mr. McCormick: I want to make this exhibit #1.

(Exhibit #1—Ware—received in evidence.)

Q. John, did you touch the pen when he wrote your name on this statement?

[fol. 311] A. I don't know whether I did or not. I don't think they asked me to touch it. I made an X on it. That's the way it was.

Q. You made an "X" on it?

A. Yes, sir.

Q. After that was done in that place, you were taken in another room?

A. Yes, sir.

Q. Do you know Dr. McQuiston?

A. I never saw him before in my life.

Q. You found out later that he was Dr. McQuiston?

A. Yes, sir.

Q. Were you asked to take your clothes off?

A. Yes, sir.

Q. Do you know why they asked you to take them off?

A. No, sir, they didn't tell me.

Q. Did this doctor examine you?

A. No, sir; I didn't know he was a doctor. He just looked at me.

Q. Did he touch your body?

A. No, sir. Somebody asked me about what made that spot on my side.

Q. Is that a birth mark?

A. I was told by a doctor that it was TB of the skin.

Q. After you put your clothes back on did they put you in jail?

A. Yes, sir.

Q. Before they put you in jail did somebody read a warrant to you?

A. I don't know about that.

Q. What happened the next day?

A. Nothing.

Q. When after that was it that Mr. Becker took you for a ride?

A. On Tuesday they carried me to Mr. Becker's office and he called me a damn liar and I stayed about 10 or 15 minutes.

Q. That happened on Tuesday. Was that the day Mr. Becker took you for a ride?

A. The next day after. The next day after I was gotten on the elevator. You mean when he asked me those questions, that was Tuesday.

Q. No. What day were you taken out to the slough?

[fol. 312] A. It wasn't this day.

Q. When did Mr. Becker take you out to the slough?

A. On Wednesday.

Q. Now, did you know where Mr. Ashcraft lived?

A. No, sir, I don't know now. They drove out a place and told me it was his home.

Q. Is that the only time you ever knew where Mr. Ashcraft lived?

A. Yes, sir.

Q. From there where did you go?

A. They taken me to the river by the bridge.

Q. What happened there?

A. They taken me down to a slough of water and made me pick up those rocks they had in here.

Q. Did you tell him they were the kind of rocks you used to kill Mrs. Ashcraft?

A. No, sir.

Q. Did you pick them up?

A. Yes, sir, he put his pistol in my mouth; then he brought me back to the jail. Mr. Ezell said "Let him alone; we've got enough to get the reward."

Q. Did they bring you back and put you in jail and have you been here ever since?

A. Yes, sir.

Q. This is the third trial that you have had in this case?

A. Yes, sir.

Q. Did you have anything to do with killing Mrs. Ashcraft, John?

A. No, sir.

[fol. 313] Cross-examination.

By General Gerber:

Q. John, when you testified here on Saturday, in the absence of the jury, I asked you whether you had ever been in jail in Clarksdale and you said you had not?

A. It just slipped my remembrance.

Q. Didn't you deny it when I asked you the same question on the last trial?

A. I denied being in the police station.

Q. I want to read this testimony to you and ask you if this happened on the last trial:

"Q. Did you ever get in any trouble in Clarksdale, ever been in jailhouse?

A. No, sir, I never was arrested there."

Q. Did you make that answer at the last trial?

A. Yes, sir.

Q. I asked you this question:

"Q. Are you sure about that? I want you to think, now. I don't want to hurry you up. I want you to tell this jury whether you were ever in the jailhouse in Clarksdale, Mississippi?

"A. If I was I don't rememver.

"Q. I want to ask you this question and I want you to think before you answer. I want you to tell the jury whether on January 15, 1938, you were not in the police station in Clarksdale, Mississippi—the jail there?

"A. I don't remember it."

Q. Did you make those answers?

A. Yes, sir.

Q. And this question was asked you:

[fol. 314] "Q. I want to ask you if your finger prints were not taken in the police station at Clarksdale, Miss. by Mr. Harlow, the man in charge of the Identification Bureau down there, on January 15, 1938?

"A. My finger prints have been taken here, out at duPont at the powder plant and they was taken in Mississippi. I was in Government work in the Government ffice out from Friar's Point."

Q. Didn't you deny on the last trial that they ever took your finger prints in the police station in Clarksdale?

A. No, sir,

Q. All right:

"Q. Don't you know the only time your finger prints were ever taken in Mississippi, they were taken at the police station?

"A. No, sir."

Q. Did you make that answer at the last trial?

A. I guess I did.

Q. John, during the last trial, when Mr. Asheraft testified in this court room, he said that his wife made this statement:—

Mr. Bickers: Just a minute. I object, your Honor. His whole purpose is to get in something by this witness that has been ruled out. He is questioning him about statements of Mr. Asheraft.

General Gerber: I am going to ask him about a statement that Mr. Asheraft made in open court.

Mr. Bickers: I object to it.

The Court: As I understand it, general, you are fixing to ask him a question——

General Gerber: About a question asked the defendant Asheraft in open court here and a statement made by him in court.

[fol. 315] Mr. Bickers: That doesn't make any difference. He is seeking to prove by this witness something that is highly improper.

The Court: Overruled. Note an exception for Mr. Bickers.

Mr. Bickers: Exception.

Q. When Mr. Asheraft was testifying from that witness stand, didn't he make this statement about his wife: he said his wife said this: "I don't know why the Lord didn't take me and let that good, able-bodied woman stay here," and I says "don't talk like that," and she says "You know, sometime I think I will take the home and car and part of the money—she didn't say half the money—and just sit here and dry up?"

Mr. Bickers: Your Honor, it is absolutely impossible for that question to be competent under any rule of evidence in this land of ours. He is asking the witness about a con-

versation that occurred, so he claims, between Mr. and Mrs. Ashcraft.

General Gerber: In this Court room.

Mr. Bickers: And Mrs. Ashcraft is dead.

The Court: Mr. Sheriff, let the jury retire.

Jury out.

General Gerber: If the Court please, we insist that the question is absolutely competent. It has nothing in the world to do with any confession that he made at any time. I want to test his credibility as a witness.

Mr. Bickers: I have been practicing law for thirty years and that is the unfairest question I ever heard asked by any lawyer in four states in which a man was being tried for his [fol. 316] liberty and his life.

Mr. McCormick: If that question is competent, then Mr. Gerber can get on the witness stand and testify that Ashcraft said these things.

The Court: I am of the opinion, General, that it is incompetent. I will be glad to hear any authorities that you gentlemen have.

General Gerber: Then will your Honor give us a little time and I will furnish the authorities.

The Court: Very well. We will take a short recess.

(Recess.)

General Gerber: If your Honor please, in furtherance of our insistence that the question is competent, we will read to your Honor the case of Rafferty vs. State, reported in 91 Tenn. page 654. (reading from volume mentioned.)

(Argument of counsel.)

The Court: Gentlemen, the view I have of this matter, for me to rule this evidence out would be flouting the language of the Supreme Court, so I am going to overrule the objection.

Mr. Bickers: Note my exception.

Mr. McCormick: I note an exception.

The Court: Bring in the jury.

Jury in.

(Continuation of examination of John Ware)

By General Gerber:

Q. John, I will ask you if, on the last trial and on the first trial, Mr. Asheraft stated this to the jury:

> "She says 'I don't know why the Lord didn't take me and let that good, able-bodied woman stay here,'' and I says 'don't talk like that,'' and she says 'You know, [fol. 317] sometime I think I will take the home and car and part of the money—she didn't say half the money—and just sit here and dry up?''

A. I think you called him back to the stand and ask him that.

Q. And did he say that happened?

A. Yes, sir.

Q. John, they took your finger prints in the jail house in Clarksdale?

A. Not in the jail house.

Q. Don't you know that this man who testified in the last trial, Mr. Harlow, who has charge of the Identification Bureau in Clarksdale, took your finger prints on January 14, 1938?

A. No, sir, he took them in the police station.

Q. And he then asked you to sign your name and you told him you couldn't read or write?

A. I don't remember that.

Q. You didn't write your name on that finger-print card?

A. I don't know whether I did or not.

Q. Don't you know this card shows your finger-prints, with your name, John Ware, Clarksdale, Miss.?

A. That's my name on there.

Q. Dated 1-14-38 and here it says "Can not write?"

A. Yes, sir.

Q. Didn't you tell that man you couldn't write?

A. If it's on there, yes, sir.

Q. At the last trial you denied that?

A. I denied having my finger prints taken.

Q. Now, John, I will show you the statement which it has been testified to that you made on the 5th floor of this [fol. 318] building on the early morning of June 16, 1941. Did you make an "X" mark on every page of this statement?

A. Yes, sir.

Q. Now, John, I want to ask you a question and I want

you to think before you answer it. Nobody is going to rush you. On that early morning of June 16th, 1941, I want to ask you whether Mr. Becker asked you this question, in the presence of Mr. Waldauer:

"Question: Now, Tom——

"Answer: Yes, sir.

"Question: You are in jail, charged with the murder of a white woman by the name of Zelma Ida Ashcraft on the early morning of June 5, 1941; and it is my duty as an officer to tell you that any statement you might make to me about this murder must be freely and voluntarily made, and it can and will be used in court against you. Knowing that, are you willing to give me a truthful statement about how you killed this woman? Are you?

"Answer: Yes, sir. I have already done it now."

Q. Was that question asked you and did you make that answer?

A. No, sir, it wasn't asked.

Q. Do you know who made that statement to Mr. Waldauer?

A. No, sir. He didn't ask me——

Q. Then Mr. Waldauer——

Mr. McCormick: Mr. Gerber, let him finish his answer.

General Gerber: Go right ahead.

A. He didn't ask me. He didn't ask me would I make a statement freely and voluntarily.

Q. I see. I want to ask you whether he asked you this question and if you made this answer:

"Question: What was Mr. Ashcraft doing at the time, and what were you doing, and where were you working?

[fol. 319] "Answer: At the time we were over here by Sears & Roebuck, we were on a pile driver. He was operating the pile driver, and I was working on the pile driver as a laborer. Well, I started to riding with him. Do you want me to tell you how I started to riding with him?

"Question: Yes.

"Answer: One evening I did not have no street car fare, and I was over at Sears Roebuck, and I asked him,

'Which way do you go, boss,' and he said, 'I go over to Chelsea,' and I asked him would he let me go with him, and he said yes, and I go over with him, and he said, 'I come through here every morning, and I can pick you up on Chelsea,' and he began to pick me up that way; and about the second morning after I was riding with him he asked me about this conversation, he told me about a boy who was a friend of his, and his wife was gone to California to take a trip, and this friend of his had a woman, outside woman—I will tell you like he told me—he had an outside woman, and his wife was coming home, and he wanted to get rid of this woman, because he had tried to make her leave and she would not, and this fellow was giving him $100.00, and he was going to get somebody—he did not have the nerve to do it, and he was going to get some help on it, and he talked to me, and I did not turn him no answer until the fifth or sixth time after he had put the question to me."

Q. Did you make that answer?
A. No, sir.
Q. I want to ask you did you make this answer:

"Question: What was that question, Tom? That is what I want you to tell me.

"Answer: He asked me did I have nerve enough to help him do the job."

A. No, sir.
Q. You didn't make that answer?
A. No, sir.
Q. All right.

"Question: Do the job?

"Answer: That is right; that is what he told me; he said 'job.' That is what he said to me. He asked me did I have nerve enough to help him do the job. I am telling it like he told me. I knew what he meant by the 'job.' He asked me did I have nerve enough to kill this woman, but he said 'job,' and I am telling it like I got it from him."

[fol. 320] A. No, sir, I didn't make that answer. It was asked me and I answered "yes, sir."

Q. Then this is not your language at all?
A. I don't know whose language.
Q. You didn't make that statement to Mr. Waldauer?
A. If it was asked me I said "yes, sir."
Q. You never said anything like that at all?
A. No, sir.
Q. I see. Did you make this answer:

"Answer: I told him I did not want to do it, and I am telling it to you just like it was, and he said 'this job.' When he first asked me to do it, I never told him I would, and then later on I told him that I would. He said for me at first to call him out, like I wanted to buy a stove he had, and I was going to sit on the porch in front, and he was going to call the woman out, and then when they got out there, for me to act like it was a hold-up, to get them both in the automobile, and to do the job that way, and after he had told me about it,—I was to quit work on the job and get another job another place, and then I was to get in touch with him. Now that was during the month of April, I don't remember what day it was, but that is when he was telling me what he wanted done."

Q. Did you make that answer to Mr. Waldauer? Think, now.
A. I don't have to think. I didn't say that.
Q. Was this question asked you and did you make this answer:

"Question: Wait a minute. Tell about the day you did the job, when you met him.

"Answer: The day he met me on the street, he taken me on to Oriole Street in his automobile, and he stopped, and he sits down and tell me to hold up my head and don't be looking downhearted, like I am scared, because it is nothing to be done—I am telling it like it was—he says it has to be done now, and if you don't see me any more, he says it will be [illegible] out to the drug store, and got out of [illegible]."

Q. Did you say that to Mr. Waldauer?
A. No, sir, I haven't told anybody that. I rode with him just three times that I remember.

[fol. 321] Q. Did you make this answer:

"Answer: I sat on the bridge on Chelsea and Oriole, I sat there 15 minutes, and I gets off the bridge, and talks down the road two or three times, and then I goes home. I had sat there on the bridge for 15 minutes, and then I gets up and goes to bed. Wednesday night at 1 o'clock he comes to my house and knocks on my door."

A. No, sir.
Q. All right.

"Question: You say 'he'. Give us the name of the person who came to your house.

"Answer: Johnny Ashcraft. He gets me up. He comes there to get me to go ahead. He eases in the house and leaves his car parked, and there is a little dog that keeps barking, and he comes out and scolds at the dog."

Q. Did you make that answer?
A. No, sir, I didn't.
Q. This question:

"Question: Was the dog barking at your house? Answer: No, at his house."

Q. Did you tell them that?
A. No, sir.
Q. Did you make this answer:

"Answer: Johnny Ashcraft comes out, and he tells me that she will be ready in 15 or 20 minutes, and first he brings out a black hat in a paper bag. Next he brings out a grip, and puts the grip in the car, and then he goes back, and Johnny Ashcraft tells me, he says, 'All right, now, she will be out in 15 minutes, and don't do any dribbling at it,' and he goes back in the house, and comes back again, and him and her comes out, and I eases around the car and grabs her, and she hollers, and Johnny Ashcraft tells her, he said, 'Don't holler; it is two of them; don't holler, it is two of them,' and I tells him to get in the car, and her too, and he asked her, 'Will you drive,' and she said, 'Yes, I will drive,'' and she gets in the car, and he got in the

car, and he said, (I haven't got any money', and he asked her if she had any money, and she said, 'yes," and she said she had $50.00, and she gave me $50.00; and so we goes on out Chelsea, and on out Jackson—I don't know all of the streets out there, and I gets to the spot out there, and I have them to stop the car [fol. 322] and when the car is stopped, he gets out of the car, and she gets out of the car, and walks down the little dirt road, and he comes to me and tells me to make her take off the wrist watch, that he might want that. She takes it off, and I takes the wrist watch and slips it to him, and I tells the woman that I am going to put her in the river first, and then her husband,—both of them, and she creams and hollers, and he grabs her and says, 'Let her have it,' and I let her have it."

Q. Did you make that answer?
A. No, sir.

General Gerber: You may stand aside.
The Court: Any questions, Mr. McCormick?
Mr. McCormick: No, sir.

(Witness excused)

The Court: Gentlemen, we will recess until 7:30 tonight.

(Recess)

Night Session: 7:30 P. M.

Juror: I would like to ask the defendant Ware a question.
The Court: All right, sir.

JOHN WARE recalled and testified as follows:

Questions by a Juror:

Q. John, what were you hit with the first time you were hit at your home?
A. I don't know sir.
Q. Where were you hit?
A. About up here. (indicating head).
Q. Were you knocked down?
A. Yes, sir.
[fol. 323] Q. What were you hit with upstairs?

A. Mr. Becker hit me with his hand. The next time he hit me with a blackjack.

Q. Where?

A. Right up here (indicating). There is a scar there now.

Q. How many times did he hit you?

A. About five times.

Q. Did the doctor examine that place on your head?

A. No, sir, he did't put his hands on me.

Q. He didn't ask you where you got those knots on your head?

A. No, sir.

Juror: That's all.

Examination.

By General Gerber:

Q. You say that scar on your left forehead, Becker put that there?

A. Yes, sir.

Q. John, don't you know that when they took your fingerprints in Clarksdale, this sheet shows a scar over your eye? Don't you know that you had that there in 1938?

A. The scar is right up here. (indicating forehead).

General Gerber: I want to make this (paper) exhibit #1 to his cross-examination.

(Exhibit #1 Cross Ware received in evidence)

General Gerber: I want to pass this to the jury to show the scar was there in 1938.

(Examination of exhibit by jury)

Q. John, you say that when Mr. Becker went with you to the slough, he shoved a pistol in your mouth?

A. Yes, sir.

[fol. 324] Q. Did he knock any of your teeth out?

A. No, sir.

General Gerber: That's all.

Examination.

By Mr. McCormick:

Q. John, have you another scar up there?

A. Yes, sir, on my head.

Q. Where is it?
A. Right up here. (indicating).
Q. Show that to the jury.

(Witness leaves witness chair and exhibits head to jury).

A. This (indicating) is the scar I am talking about.

Mr. McCormick: That's all.

(Witness excused.)

Mrs. G. C. Gambreal the next witness for defendant Ashcraft, being sworn, testified as follows:

Direct examination.

By Mr. Bickers:

Q. State your name, please, ma'am.
A. Mrs. G. C. Gambreal.
Q. Where do you live?
A. 3494 Stanton Road.
Q. Where is your residence located with reference to the house formerly occupied by Mr. and Mrs. E. E. Ashcraft?
A. They lived right across the street from me.
Q. You know Mr. Ashcraft?
A. Oh, yes.
Q. And you knew Mrs. Ashcraft?
[fol. 325] A. About two years.
Q. How long have you lived there?
A. About 20-½ years.
Q. How well did you know Mr. Ashcraft?
A. Well, he worked every day and naturally I saw his wife more than I did him. I saw her every day and sometimes twice a day.
Q. And you and Mrs. Ashcraft visit back and forth?
A. We did.
Q. Did you have occasion to observe the manner in which Mr. and Mrs. Ashcraft got along?
A. Perfect! as far as I could tell.
Q. During the time you knew them, did you ever observe anything to indicate that there was any marital differences between them?
A. I did not.

Q. Do you know of your own knowledge whether or not Mrs. Ashcraft had made arrangements to pay a visit to her mother?

A. She had. She was making preparations for that visit two weeks.

Q. Were her plans interrupted?

A. Yes, because she had company. Mr. Ashcraft's niece's mother came from Arkansas to visit, I believe.

Q. Do you recall the day her body was found in that slough?

A. Yes.

Q. Did you see Mr. Ashcraft that afternoon?

A. Yes, sir.

Q. Did one of the officers meet him?

A. I believe they walked across the street and met him before he got in the house.

Q. I am going to ask you if you know Mr. Ashcraft's reputation for peace and quietude?

[fol. 326] A. I would say good.

Q. Do you know of your own konwledge anything about the condition of Mrs. Ashcraft's automobile, whether——

A. Well, I believe about two months previous to that she had started some place in the car and something went wrong with it and she passed by my house and went on after Mr. Ashcraft to fix it.

Q. You know of your own knowledge that the car stopped?

A. Yes, sir. My husband picked him up and brought him back.

Q. Mrs. Ashcraft was a nervous type of woman?

A. Yes, sir.

Mr. Bickers: That's all.

Cross examination.

By General Gerber:

Q. She was taking medicine all the time for nervousness?

A. Yes, sir.

Q. She was a very nervous woman?

A. Yes, sir.

Q. Did they have a small dog there?

A. Yes, sir.

Q. Do you know how many times Mr. Ashcraft was married?

A. No, sir.

General Gerber: You may stand aside.

(Witness excused.)

[fol. 327] Mrs. Ben Wassum a witness for the defendant Ashcraft, being sworn, testified as follows:

Direct examination.

By Mr. Bickers:

Q. Please state your name?

A. Mrs. Ben Wassum.

Q. What does your husband do?

A. He is a Captain on the Memphis Fire Department.

Q. Where do you live?

A. 875 Jackson Avenue for about 25 years.

Q. Do you know Mr. E. E. Ashcraft?

A. Yes, sir.

Q. Did you know his wife?

A. I did.

Q. How did you happen to know them?

A. I had an apartment for rent and they rented it.

Q. How long did they live in your home?

A. From May of 1935 to November of 1936.

Q. Did you have occasion to know them intimately during that time?

A. I sure did.

Q. What was Mr. Ashcraft's attitude toward his wife during that time?

A. Just fine. He was very considerate and kind to her.

Q. I will ask you if she made a trip during that time to see her mother and came back home unexpectedly?

A. Yes, sir, Mr. Ashcraft's mother died and he wired her and she came right back.

Q. How did Mr. Ashcraft handle his financial affairs?

A. I think she handled them all. He let her handle all his money.

[fol. 328] Mr. Bickers: You may take the witness.

Cross-examination.

By General Gerber:

Q. Did you see very much of them after they moved from your place?

A. Yes, sir.

Q. This killing of Mrs. Ashcraft occurred on June 5th, 1941. How long prior to that was it that you had seen Mrs. Ashcraft?

A. I seen Mrs. Ashcraft twice just a little before that?

Q. You testified at the last trial of this case?

A. Yes, sir.

Q. Just listen to this, your testimony at the last trial:

"Q. You and your husband testified at the last trial?

A. Yes, sir.

Q. I believe you stated at the last trial that the last time you saw Mrs. Ashcraft was in May of 1940?

A. Yes, sir, in May of 1940.

Q. Was that your testimony at that time?

A. I wouldn't know.

Q. Was that your testimony at the last trial, that the last time you saw her was in May of 1940? 'The last time you saw her was in the spring of 1940?' 'Yes, sir.'

Q. Is that right?

A. If you have it down there it must be right.

Q. I am asking you if that is your testimony at the last trial?

A. Mr. Gerber I can't remember.

General Gerber: You may stand aside.

(Witness excused.)

[fol. 329] CORA TAYLOR (Colored) called as a witness for defendant Ashcraft, sworn and testified as follows:

Direct examination.

By Mr. Bickers:

Q. State your name to the Court and Jury?
A. Cora Taylor.
Q. Where do you live?
A. 1547 Ash.
Q. Do you know Mr. E. E. Ashcraft?
A. Yes, sir.
Q. Did you know his wife?
A. Yes, sir.
Q. Did you work for them?
A. Yes, sir, six months.
Q. After Mrs. Ashcraft's death were you brought to this jail?
A. Yes, sir.
Q. How long did you stay in jail?
A. Twelve or 13 days.
Q. Were you questioned by the officers during that time?
A. They asked me questions once in a while but not often.
Q. I'll ask you if you told the officers who questioned you about the location of that watch in Mrs. Ashcraft's home? In other words, did you tell the officers where you got the watch and where you put it after her death?
A. Well, I got it off a box. I put it in the chest of drawers.

Mr. Bickers: You may take the witness.

Cross-examination.

By General Gerber:

Q. You worked for Mr. and Mrs. Ashcraft?
[fol. 330] A. Yes, sir.
Q. Did you see much of Mr. Ashcraft? —
A. No, sir, not very much of him.
Q. You came to work on June 5 and everyone was gone?
A. Yes, sir.
Q. You cleaned up the house?
A. Yes, sir.
Q. You saw this watch lying there and you put it in a drawer?

A. Yes, sir.

Q. You were brought up here on the night of June 5th?

A. Yes, sir.

Q. You stayed up here a week or ten days. Did anybody mistreat you?

A. No, sir.

Q. Did anybody try to make you say you had anything to do with the killing of Mrs. Ashcraft?

A. No, sir.

Q. Did anybody beat or abuse or curse you?

A. No, sir.

Q. You were here when the officers brought two colored boys up here, Plummer and Kimbrough?

A. Yes, sir.

Q. Did anybody mistreat them in your presence?

A. Not that I know of.

General Gerber: That's all.

(Witness excused.)

[fol. 331] J. T. Craig sworn and testified as follows:

Direct examination.

By Mr. Bickers:

Q. State your name, please, sir?

A. J. T. Craig.

Q. Where do you work now?

A. Dyersburg Air Base at Halls, Tennessee?

Q. Where were you working on June—in June, 1941?

A. On the Cypress Creek Pumping Station in Memphis.

Q. Who were you working for then?

A. Korsmo Construction Company.

Q. What was your official capacity?

A. Superintendent of the job.

Q. Do you know E. E. Ashcraft?

A. Yes, sir. He worked for me in Tupelo, Miss., in 1940 and he came on the Cypress Creek job and worked there.

Q. How long did he work for you in Tupelo?

A. Six weeks or two months.

Q. Did you live close together then?

A. Yes, sir, it was a small town.

Q. Did you have occasion to see him frequently?

A. Every day on the job. Ten hours a day.

Q. Did you see E. E. Ashcraft on June 5, 1941?

A. Yes, sir.

Q. Tell the jury what time you saw him that day?

A. I would say around 5:30 in the morning, before six o'clock.

Q. Under what circumstances did you see him?

[fol. 332] A. I was going to work and overtook him walking from the street car line and picked him up and carried him to the job.

Q. What was the nature of his employment?

A. Drag Line Operator and running the concrete mixer. We used at that particular time the drag line as a clam shell, with buckets to throw out and pick up dirt.

Q. How far up from the ground is the cab of that drag line?

A. Four or five feet.

Q. After he got this bucket full and swung it around to where he was going to dump it, was it necessary for him to pass that over the heads of other workmen?

A. Yes, sir.

Q. I will ask you if Mr. Ashcraft operating that drag line, had made a mistake in lifting this clam shell around, he would have endangered the lives of those other workmen?

A. Yes, he could have killed them if he didn't watch his step.

Q. A man to do that work has to be calm and steady?

A. He has got to be.

Q. Did you see any indication of nervousness or excitement on his part from the time you picked him up on the 5th day of June until he quit work at 5:30 that same day?

A. No, sir, I did not.

Q. Was he any different than he always was?

A. No, sir.

Q. Do you know or think you know his reputation among his friends, neighbors and acquaintences for peace and quietude?

A. If he ever had any trouble I never knew it.

[fol. 333] Q. Would you say that reputation was good?

A. I never heard otherwise.

Mr. Bickers: You may take the witness.

Cross-examination.

By General Gerber:

Q. You say on this morning of June 5 you picked him up between 5:30 and six o'clock?
A. Yes, sir.
Q. What time did he got off?
A. Went to work at 6:00 and got off at 5:30.

General Gerber: You may stand aside.

WAYNE MEANS sworn and testified as follows:

Direct Examination.

By Mr. Bickers:

Q. State your name, please?
A. Wayne Means.
Q. Where do you work?
A. Korsmo Construction Co.
Q. How long have you worked there?
A. About 8-½ years.
Q. What is your position with that company?
A. Engineer, estimator.
Q. Do you know Mr. E. E. Ashcraft?
A. Yes, sir. I have known him since about the summer of 1938.
Q. He has been working for your company since that time?
A. Yes, sir.
Q. Can you tell us what his income was with your company?
[fol. 334] A. He made $1.25 an hour and for 10 hours work $12.50 a day.
Q. His work consisted principally of what?
A. Operating a drag line.
Q. Did you have occasion to see him on June 5, 1941?
A. Yes, sir, if that is the day this crime was committed.
Q. Tell the jury when you saw Mr. Ashcraft that day?
A. Well, he was working on the drag line and I went up to see how they were getting along and we were short some spring for a mold and I went to see Johnny. I climbed

up on his machine and he didn't know I was there and I yelled in his ear, "Johnny, do you know where such and such a spring is," and he turned around and said "I think it is in the tool house," and I climbed back and left him.

Q. When you yelled in his ear did he jump or show any unusual reaction?

A. No, sir, just turned around and answered me.

Q. He then continued on with his work?

A. He never did stop.

Q. Is that a hazardous job?

A. You have to have a careful operator.

Q. Can you refer to your records and tell us how long he had been working on that job out there?

A. He came there December 14th, the first record we have, 1940.

Q. From your knowledge and contact with Mr. Asheraft, what is his reputation for peace and quietude?

A. I have never seen him out of order.

Mr. Bickers: Take the witness.

[fol. 335] Cross-examination.

By General Gerber:

Q. The character of work he did developed steady nerves?

A. I don't know about the development. You have to have fairly steady nerves.

Q. Have you got a record show- the men on the bowling alley job?

A. Yes, sir.

Q. Mr. Asheraft and John or Tom Ware worked together on that job?

A. Some of the time.

Q. Tell us the days they worked together?

A. This is 1941; April 18, 19, 21, 22, 23 and 24.

Q. Those are the days that the defendants Asheraft and Ware worked together on that job?

A. Worked on the job, yes, sir.

General Gerber: That's all.

(Witness excused.)

L. A. TVEDT sworn and testified as follows:

Direct examination.

By Mr. Bickers:

Q. Please state your name?
A. L. A. Tvedt.

Q. What is your business?
A. Member of the firm, Korsmo Construction Company.

Q. How long have you been engaged in that business?
A. I have been with Mr. Korsmo since 1931. I have been in Memphis since 1925.

Q. Do you know E. E. Ashcraft?
[fol. 336] A. Yes, sir, I think Johnny came to work for us in 1937 of 1938.

Q. During the time he has worked for you have you come in contact with him seldom or often?
A. With reasonable frequency.

Q. During the time he has worked for you, whenever you needed Mr. Ashcraft to do a job for you, were you able to locate him?

A. That was one thing about Johnny, if he wasn't working I would call his home and he would either be there or his wife would know where he was.

Q. Do you know anything about his frugality?
A. Well, yes, he always had money. He never squandered his money.

Q. Do you know or think you know his general reputation for peace and quietude among his friends, that is his fellow workmen?
A. Yes, sir.

Q. Is that reputation good or bad?
A. Excellent.

Q. Did you know Mrs. Ashcraft during her lifetime?
A. She was in the office a few times to pick up Johnny's check.

Mr. Bickers: Take the witness.

Cross-examination.

By General Gerber.

Q. He had very steady nerves, did he not?
A. His nerves were good, yes.

General Gerber: That's all.

Redirect examination.

By Mr. Bickers:

Q. He had to have good nerves to run that thing?
A. Yes, sir.

Mr. Bickers: That's all.

(Witness excused.)

[fol. 337] General Gerber: I want to recall Mr. Craig.

J. T. Craig recalled and testified as follows:

By General Gerber:

Q. What year did you say Mr. Asheraft worked for you in Tupelo?
A. 1940 the first time.
Q. For about six weeks?
A. Yes, sir.
Q. Did he stay there constantly during that time?
A. If he left I didn't know it.
Q. On June 5 you say he got off at 5:30 P. M.?
A. Yes, sir.
Q. What time did he get off the day before that?
A. Same time.

General Gerber: That's all.

(Witness excused.)

Mr. Bickers: That completes my witnesses for tonight. I have two witnesses and I will read the statements of four witnesses in the morning that General Gerber and I have agreed that I can read. I will be through in thirty minutes. If your Honor says so we can go ahead and read these four statements tonight.

The Court: Unless you have some reason for not wanting to read them before you put your witnesses on.

Mr. Bickers: No reason at all. Let me see, we have one witness we can put on.

J. A. WESTIN sworn and testified as follows:

[fol. 338] Direct examination.

By Mr. Bickers:

Q. State your name to the jury?
A. J. A. Westin.
Q. What is your business?
A. Construction Superintendent.
Q. For what Company?
A. E. O. Korsmo Construction Co.
Q. How long have you been working for that firm?
A. Since 1921.
Q. Do you know Mr. E. E. Ashcraft?
A. Yes, sir.
Q. Did he ever work under your supervision?
A. Yes, sir.
Q. Did he work under you in Jackson, Miss.?
A. Yes, sir, he did from the latter part of September, 1940 to about the middle of November, 1940, about two months.
Q. Did you have occasion to contact the men who worked for you, every day?
A. Yes, sir.
Q. Mr. Ashcraft worked in what capacity?
A. We were drilling some foundations and he was operating the drill.
Q. How many hours a day did he work?
A. Eight or ten hours.
Q. Did he leave Jackson, if you know, during this job, and where did he go?
A. Two or three times during the time he was there he [fol. 339] asked me if he could get off Saturday afternoon to drive home to Memphis.
Q. Did he tell you what he was coming to Memphis for?

General Gerber: I object to that, any conversation.

Q. Was he always back Monday morning on the job?
A. Yes, sir.

Q. Was he sober and trustworthy on the work?

A. Yes, sir.

Q. Was he a competent workman?

A. He was the best there was.

Q. Do you know his general reputation among his fellow workers for peace and quietude?

A. He had a very good reputation with the men on the job.

Mr. Bickers: You may take the witness.

Cross-examination.

By General Gerber:

Q. If he hadn't been sober he couldn't have worked on that job?

A. That's right.

Q. He had to be cold sober and have steady nerves to do that work?

A. Correct.

Q. He had to have good eyes?

A. Eyes are not very necessary.

Q. When he would leave that job on Saturday, you don't know of your own knowledge where he went?

A. No, sir.

General Gerber: That's all.

(Witness excused.)

[fol. 340] Mr. Bickers: If your Honor please, by agreement with General Gerber, I am going to read the testimony of some witnesses who testified at the last trial. General, I am going to stand up when I read these; my belly feels better when I stand.

General Gerber: It does?

Mr. Bickers: Yes. These four witnesses testified at the last trial of this case. They are trained nurses now.

General Gerber: The testimony speaks for itself. Just read it.

Mr. Bickers: I'm going to. The first is the testimony of Geraldine Minnich.

Testimony of Geraldine Minnich, from second trial, read:

"GERALDINE MINNICH was sworn and testified as follows:

Direct examination.

By Mr. Bickers:

Q. This is Miss Geraldine Minnich?
A. Yes, sir.
Q. Where do you live at the present time?
A. Methodist Hospital, Memphis.
Q. Where were you living during 1941?
A. The same place.
Q. You are a student nurse?
A. Yes, sir.
Q. And you were a student nurse during 1941?
A. Yes, sir.
Q. Do you know Mr. Ashcraft?
A. Yes, sir.
Q. Did you know Mrs. Ashcraft during her lifetime?
A. Yes, sir.
Q. State whether or not you had occasion to visit the home of Mr. and Mrs. Ashcraft on Stanton Road?
A. Yes, many times. We enjoyed being out there. We were good friends and they seemed to enjoy having us.
[fol. 341] Q. Have you eaten with them?
A. Yes, sir. We usually went out there several times a month.
Q. How did they get along, Miss Minnich?
A. Well, they always seemed very devoted to each other; I never have seen a happier couple.
Q. Were you there on June 4, 1941?
A. Yes, sir. I got there about 5 o'clock in the afternoon.
Q. Was Mr. Ashcraft home then?
A. No, sir.
Q. Who else was there?
A. Mr. Ashcraft's cousin, Miss Hightower, and the two Misses Rice and I.
Q. How long had you been there when Mr. Ashcraft got there?
A. He came in about 7:00 o'clock.
Q. What if anything was done after he got there?
A. Well, we just sat around and talked and someone mentioned getting a drink and we went and got some gin.

Q. Who got the gin?
A. Mrs. Ashcraft and Miss Rice and I.
Q. When you got the gin, you fixed a highball?
A. Yes, sir.
Q. Then what happened?
A. We had dinner.
Q. Would you say about what time you had dinner?
A. It must have been around 8 o'clock.
Q. After dinner did you stay for any length of time?
A. We left about 9:00 o'clock.
Q. Was Mr. Ashcraft apparently in good humor?
A. Yes, sir.
Q. And Mrs. Ashcraft, too?
A. Yes, sir. Both of them were.

[fol. 342] Q. Did Mrs. and Mr. Ashcraft act any differently that night than they acted on any other night you were out there?
A. No, sir.
Q. Do you know whether or not Mrs. Ashcraft was planning to leave on a trip the next day?
A. Yes, sir, she had told us——

The Court: Not what she told you.

Q. Not what she told you, but you knew about that?
A. Yes, sir.
Q. I want to ask you this: from the time Mr. Ashcraft came in there at 7 o'clock, did he leave that house until he took you all home at 9 o'clock?
A. No, sir.
Q. He didn't leave the house?
A. No, sir.
Q. Then at 9 o'clock did Mr. and Mrs. Ashcraft take you ladies to the hospital?
A. Yes, sir.
Q. Did you all stop on the way to the hospital?
A. We stopped at Hall's Drug Store.
Q. Who went in the store?
A. I went in with Mrs. Ashcraft.
Q. State whether she made a purchase?
A. She got some amytal tablets.
Q. That's a sedative?
A. Yes, sir.
Q. Do you know of your own knowledge if she was a frequent user of amytal or other sedatives?

A. I know she took sedatives sometimes.
Q. When she made this purchase where did you all go?
A. They took us back to the hospital.

[fol. 343] Q. Miss Minnich, from what you have seen and observed of Mr. and Mrs. Asheraft, and being in their home, and their attitude over the period of time you have known them, do you know or think you know the reputation of Mr. Asheraft?

A. Yes, sir.
Q. Is it good or bad?

General Gerber: Reputation for what?
The Court: Objection sustained.

Q. For truth and veracity or the opposite qualities?
A. Yes, sir.
Q. Is it good or bad?
A. Good.
Q. Would you give him full faith and credit on his oath in a court of justice where his interest was involved?
A. I certainly would.

Cross-examination.

By General Gerber:

Q. You say you had dinner at 8 o'clock?
A. As near as I remember.
Q. How do you place the time at 8 o'clock?
A. Well, we left right after Mr. Asheraft came at seven and got the gin.
Q. How do you know it was 7 o'clock when he got there.
A. It *would* around 7.
Q. How do you know that?
A. Because—well I don't know exactly. The maid left at six.
Q. How do you know that?
A. It was around that time.
Q. You have no way of telling how you arrive at your statement that it was around six?
A. No.

General Gerber: That's all.

[fol. 344] Mr. Bickers: I submit that "because" is still a good answer from a lady.

General Gerber: I don't think we need any side remarks. This is a serious matter."

(Testimony of Miss Nancy Hightower from 1st trial read.)

"Miss Nancy Hightower called as a witness for defendant, being first duly sworn, testified as follows:

Q. This is Miss Nancy Hightower?
A. Yes.
Q. Miss Hightower, I believe you are related to the defendant Asheraft?
A. Yes, sir.
Q. What is that relationship?
A. Cousin.
Q. Where is your home?
A. Gillett, Arkansas.
Q. In what business are you engaged?
A. I am a student nurse at Methodist Hospital.
Q. How long have you been a student nurse?
A. Almost three years.
Q. During the time you have been a student nurse you have been residing in Memphis?
A. Yes, sir.
Q. Do you know or did you know Mrs. E. E. Asheraft?
A. Yes, sir.
Q. Did you know her as the wife of E. E. Asheraft?
A. Yes, sir.
Q. When did you meet Mrs. Asheraft?
A. I met her before I came here several times.
Q. After you came to Memphis, did you continue that acquaintenceship?
A. Yes.
Q. Did you visit with her?
A. Yes, sir.
[fol. 345] Q. Seldom or frequently?
A. Frequently.
Q. Do you recall the particular night of June 4th?
A. Yes, sir.
Q. The night prior to the finding of Mrs. Asheraft's body?
Q. Were you in the home of Mr. and Mrs. Asheraft that night?

Q. Who was with you?

A. Three girl friends?

Q. And those three friends are the two Misses Rice and Miss Minnich?

A. Yes, sir.

Q. About what time did you reach Mrs. Asheraft's home?

A. About five o'clock.

Q. On that particular night, what time were your required to return to the nurses home?

A. I was on night duty and I had to be on duty at ten o'clock and I had to get back and get ready to be on duty at that time.

Q. You and your friends reached the Asheraft home at five o'clock?

A. Yes, sir.

Q. Was Mrs. Asheraft present?

A. Yes, sir.

Q. What was her condition relative to whether or not she was in good spirits?

A. She was in good spirits.

Q. What time did Mr. Asheraft come home?

A. It was around seven o'clock?

Q. What seemed to be his manner and demeanor that night on returning?

A. He acted the same as he usually did. He was in good spirits and glad to see us out there.

Q. Did he usually act very friendly?

A. Yes, sir.

[fol. 346] Q. Did he so act that night?

A. Yes, sir.

Q. Did you all eat dinner there?

A. Yes, sir.

Q. That would be six of you—you and your friends and Mr. and Mrs. Asheraft?

Q. When Mr. Asheraft returned home, did someone purchase gin?

A. Yes, sir.

Q. Who did that?

A. Mr. Asheraft and two of the girls.

Q. And about how much gin was drunk?

A. There wasn't very much gone out of the bottle; possibly two inches from the top.

Q. Do you recall what time you left to go back to the nurses home?

A. We left I imagine about 9:00 o'clock or 9:15.

Q. Who took you back?

A. Mr. and Mrs. Asheraft in their car.

Q. Did you make any stop between the Asheraft home and the hospital?

A. Yes, sir.

Q. Where did you stop?

A. Hall Drug Store.

Q. Who went in the drug store?

A. Mrs. Asheraft and Miss Minnich.

Q. Then did you go on to the hospital?

A. Yes.

Q. You say you had been visiting in the home of the Asherafts for about three years?

A. Yes, sir.

[fol. 347] Q. Did you notice anything at all unusual about the conduct and demeanor of Mr. Asheraft or Mrs. Asheraft on this night?

A. No, sir.

Q. You noticed nothing unusual about the conduct or demeanor of Mr. Asheraft this particular night?

A. No, I didn't.

Q. Did he seem to be under restraint, or free and easy?

A. He seemed just as easy as he had at any time I was out there.

Q. While he was driving you home, did you all have a general conversation?

A. Yes.

Q. Did Mr. Asheraft show any reluctance to talk?

A. No, sir.

Mr. Rhem: I believe that's all.

General Gerber: No questions.

(Witness excused.)"

Testimony of Mrs. H. Rollings Gibson, second trial, read:

"Mrs. H. Rollins Gibson sworn and testified as follows:

Direct examination.

By Mr. Bickers:

Q. This is Miss Rice?
A. My name is now Mrs. H. Rollins Gibson.
Q. Miss Rice, what do you do?
A. I do general duty, nursing.
Q. Are you a student or graduate nurse?
A. Graduate.
Q. Where is your sister, the other Miss Rice?
A. In the army nursing corps, in Mississippi.
Q. Where is Miss Hightower?
A. Camp Forrest—at Camp Shelby, rather, and my sister is at Camp Forrest.

[fol. 348] General Gerber: Pardon the interruption, but I didn't get the lady's name.

The Court: She said her name is Mrs. H. Rollins Gibson.

Q. Did you know Mrs. Ashcraft in her lifetime?
A. Yes, sir.
Q. Do you know Mr. Ashcraft?
A. Yes, sir.
Q. How long have you known both of them?
A. Since about the middle of 1939.
Q. Did you visit in their home frequently?
A. Yes, sir, quite often, every two or three weeks.
Q. Who usually accompanied you on those visits?
A. Miss Hightower and my sister and Miss Minnich.
Q. On June 4, 1941, the night before Mrs. Ashcraft was killed, were you four out there?
A. Yes, sir, we were.
Q. What time did you get there?
A. About 4:45 or 5 o'clock.
Q. How did you get there?
A. On a street car.
Q. Did you see Mr. Ashcraft when you got there?
A. No, he came in about 7 o'clock.
Q. Did he have his work clothes on?
A. Yes, sir.
Q. Who went after the gin?

A. Mrs. Ashcraft and Miss Minnich and myself.

Q. After that you ate dinner?

A. Yes, sir.

Q. About what time did you leave?

A. We left about 9:15. Mr. and Mrs. Ashcraft carried Miss Minnich and myself and Miss Hightower and my sister to the hospital.

[fol. 349] Q. Did you know that Mrs. Ashcraft was making preparations to leave on a visit the following day?

A. Yes, sir.

Q. Did Mr. E. E. Ashcraft leave that house from the time he got there at 7 o'clock on June 4, 1941, until he left with you all at 9:15?

A. No, he did not.

Q. He was there in company with you people all evening?

A. Yes, sir.

Q. What was the attitude of Mr. and Mrs. Ashcraft toward each other?

A. Well, it seemed to me they were the same as they had always been. They were jolly and everybody had a good time. They were always devoted to each other and I thought very congenial.

Q. From what you know of Mr. Ashcraft do you know or think you know his general reputation for peace and quietude, honesty and veracity or the opposite qualities?

A. Yes,

Q. Is it good or bad?

A. Very good.

Q. Would you believe him when he testified in Court under oath where his interests were involved?

A. Yes.

Mr. Bickers: You may take the witness.

Cross-examination.

By General Gerber:

Q. You of course don't know how they got along when you were not there?

A. No, sir.

Q. Was Mr. Ashcraft jolly that night?

A. Yes, sir, about the same.

[fol. 350] Q. Did he complain about anything being wrong with him?

A. He said he had a headache.
Q. Did he take some medicine at that time?
A. No, sir.

General Gerber: That's all.

(Witness excused.)"

Testimony of Miss Hazel Rice, First trial, read:

"HAZEL RICE, being first duly sworn, testified as follows:

Direct examination.

By Mr. Rhem:

Q. This is Miss Hazel Rice?
A. Yes, sir.
Q. You are at present a student nurse?
A. Yes, sir, have been for two years and ten months.
Q. Where is your home?
A. Orlando, Florida.
Q. Miss Ella Rice is your sister?
A. Yes, sir.
Q. She has been a student nurse the same length of time you have?
A. Yes, sir.
Q. Do you know the defendant, E. E. Ashcraft?
A. Yes, sir.
Q. How long have you known him?
A. About two years and a half.
Q. How did you meet him?
A. I met him through Miss Hightower who was my room mate.
Q. Do you know Mrs. Ashcraft, or did you know her?
A. Yes, sir.
Q. Through whom did you meet her?
A. I met her the same time I met Mr. Ashcraft.
Q. Was that in the Ashcraft home?
A. Yes, sir.
[fol. 351] Q. Did you, with Miss Hightower, visit Mr. and Mrs. Ashcraft often?
A. About once a month or every six weeks.

Q. Were you present in the Ashcraft home on the night of June 4th?

A. Yes, sir.

Q. About what time did you reach the Ashcraft home?

A. About 4:45 or five o'clock.

Q. Who was with you?

A. My sister and Miss Hightower and Miss Minnich.

Q. What was Mrs. Ashcraft's condition as to whether she was in good spirits or not?

A. Well, she was dressed and she seemed to be about the same as she always did; seemed to be feeling all right.

Q. During the times you had visited the Ashcraft home, how did Mr. Ashcraft treat his wife?

A. Well, they were both always jolly and seemed to be happy together.

Q. What time did Mr. Ashcraft come home on the night of June 4th?

A. About 7:00 o'clock.

Q. You all had dinner there?

A. Yes, sir.

Q. And I believe some of you had a coc-tail?

A. Yes, sir.

Q. Who mixed those cocktails?

A. Mrs. Ashcraft.

Q. After you had dinner, what time did you leave their home?

A. About 9:15.

Q. Were both Mr. and Mrs. Ashcraft with you when you left?

A. Yes, sir.

Q. Did they take you back to the Methodist Hospital?

A. Yes.

[fol. 352] Q. Did you stop on the way there?

A. We stopped at Hall Drug Store.

Q. During that trip from the Ashcraft home back to the Methodist Hospital, how did Mr. Ashcraft treat his wife then?

A. I didn't notice anything whatsoever unusual; the same as he always had.

Q. Was he jolly?

A. Yes.

Q. Did he appear to be nervous?

A. Not in the least.

Q. Who drove the car?

A. Mr. Ashcraft drove if.
Q. Did Mrs. Ashcraft have any plans for the next day?
A. She told us——

General Gerber: We object to that.
The Court: She had planned to go to Kentucky early the next morning?

A. Yes, sir.

Mr. Rhem: That's all.
General Gerber: No questions.

(Witness excused)"

Mr. Bickers: Your Honor, that's all the witnesses we have for tonight.
The Court: We will adjourn until 9:30 tomorrow morning.

[fol. 353] JURY IN

MORNING SESSION—November 28, 1944

MR. BEN WASSUM sworn and testified as follows:

Direct examination.

By Mr. Bickers:

Q. This is Captain Ben Wassum, connected with the Memphis Fire Dept.?
A. Yes, sir.
Q. How long have you been with the fire department?
A. 18 years.
Q. Do you know Mr. E. E. Ashcraft?
A. Yes, sir.
Q. How long have you known him?
A. Since either 1935 or 1936, he rented an apartment from us and lived at our house for 14 or 16 months.
Q. Did you see him often or seldom during that time?
A. Every morning and every night.
Q. Did you know his wife in her lifetime?
A. Yes, sir.
Q. Did you see her often?
A. One time nearly every day.

Q. During that 14 months that they lived in your house, what was Mr. Ashcraft's attitude toward his wife?

A. I never heard them argue one time. They never had no trouble at all. They were fifty-fifty.

Q. Did you visit with them?

A. Me and my wife used to play cards with Johnny and his wife. We did that quite often.

Q. In those card games what was his attitude toward his wife?

[fol. 354] A. I never heard them fuss at no time.

Q. Do you know how he handled his money?

A. Well, she went off that time to Louisville and he put his checks under that scarf. He was there every night.

Q. Do you know or think you know his reputation for peace and quietude?

A. He was a peac-able man.

Q. Was that reputation good or bad?

A. Good.

Mr. Bickers: That's all.

Cross-examination.

By General Gerber:

Q. You say you first met him in 1935 or 1936?

A. Yes, sir. I am not positive about those dates.

General Gerber: That's all.

(Witness excused.)

JOHN W. TURNER sworn and testified as follows:

Direct examination.

By Mr. Bickers:

Q. State your name to the court and jury?

A. John W. Turner.

Q. What is your business?

A. Construction foreman and superintendent, Korsmo Construction Co.

Q. Where are you located now?

A. Uhlan, Illinois.

Q. When did you leave Illinois to come here?

A. Last night at 6:30.

[fol. 355] Q. How long have you worked for Korsmo?

A. Since 1923.

Q. Do you know the defendant Asheraft?

A. Yes, sir.

Q. How long have you known him?

A. Since the latter part of 1939.

Q. As I understand it, in 1941, your concern was doing some work in North Memphis on the Cypress Creek job?

A. Yes, sir.

Q. Were you foreman on that job?

A. Yes, sir.

Q. Was Mr. Asheraft working on that job?

A. Yes, sir.

Q. Did you have occasion to see him there?

A. Yes, sir, I worked with him.

Q. Did you have occasion to try to locate Mr. Asheraft during the times he has worked with you, and if so, how would you locate him?

A. I have called him a number of times and would find him at home.

Q. Did you see him on June 5, 1941?

A. Yes, sir, on the job.

Q. Did he work all that day?

A. Yes, sir.

Q. Did you see him that afternoon?

A. Yes, sir. I was with him part of the time.

Q. Did you leave the job together?

A. Yes, sir, I drove him almost home.

Q. You lived in the same neighborhood?

A. Yes, sir.

[fol. 356] Q. Did you know his wife during her lifetime?

A. I met her.

Q. Tell the court and jury what Mr. Asheraft's manner and demeanor was with reference to nervousness on the 5th of June when you caried him almost home?

A. I couldn't tell any difference in him than any other day.

Q. What *what* you know of him, do you think you know his reputation among his neighbors and fellow workmen for peace and quietude?

Mr. Bickers: Take the witness.

Cross-examination.

By General Gerber:

Q. How long did it take you to drive from where you got off work to where you put him out?
A. Ten or fifteen minutes.

General Gerber: You may stand aside.

Cross-examination.

By Mr. McCormick:

Q. Do you know John Ware?
A. Yes, sir.
Q. John worked as a laborer for a few days on the Cleveland Street job?
A. Yes, sir.
Q. Do you remember one occasion when it was raining very hard and John was asking you for a way to go home?
A. I remember there were some rainy days. He may have asked me that but I am not positive about it.
Q. You just don't remember?
A. That's right.

(Witness excused.)

[fol. 357] Mr. Bickers: The defendant E. E. Asheraft, rests.

Mr. Lytel McKee called as a witness for the defendant Ware, being first duly sworn, testified as follows:

Direct examination.

By Mr. McCormick:

Q. Will you state your name to the Court and Jury?
A. Lytell McKee.
Q. Where do you live?
A. Memphis.
Q. What is your business?
A. Cotton factor.
Q. I believe you are State Election Commissioner?
A. I think so.

Q. Mr. McKee, do you and your brother operate a plantation in and around Friar's Point, Miss.?
A. We do.
Q. How often do you go to that plantation?
A. About once a week.
Q. Do you know the tenants on your plantation?
A. Yes.
Q. Do you know the family of John Ware?
A. Yes.
Q. Did that family live on your plantation at one time?
A. Yes.
Q. Did this boy John Ware live down there with his father and mother?
[fol. 358] A. Yes, he has grown quite a bit.
Q. They went down there what year?
A. In 1929.
Q. And remained until when?
A. Until the high water I think in 1937.
Q. During the time you have known this boy John Ware on your plantation, do you know or think you know his general reputation for peace and quietude among his friends, neighbors and acquaintences and the people on the plantation?
A. Yes, I do.
Q. Is that reputation good or bad?
A. It was very good.
Q. From that reputation would you believe him in a Court of Justice where he was an interested party?
A. I would.
Q. You would give his testimony full faith and credit?
A. Yes.

Mr. McCormick: I believe that's all.

Cross-examination.

By General Gerber:

Q. When was the last time you saw him?
A. Seven or eight years ago.

General Gerber: That's all.

(Witness excused.)

Mr. McCormick: The defendant Ware rests.

[fol. 359] REBUTTAL OF STATE

GEORGE A. BECKER recalled and testified as follows:

By General Gerber:

Q. Mr. Becker, I want to ask you if at any time while the defendant Ware was in your custody, from the time you picked him up on Oriole Street on the early morning of June 16th, you struck or abused him or knocked him down or hit him on the head?

A. No, sir, he wasn't touched.

Q. I want to ask you if anyone put him in a padded cell in this jail prior to the time he made his statement?

A. No, sir.

Q. I will ask you to state whether you took him out to the slough and put a pistol in his mouth?

A. I did not.

Q. Did you at any time beat him up?

A. I did not.

General Gerber: That's all.

Cross-examination.

By Mr. McCormick:

Q. Didn't you take him to the scene of the murder?

A. We went to the scene. We went to his house.

By General Gerber:

Q. You went to his house and he directed you to the scene of this murder?

A. Yes, sir.

General Gerber: That is all.

(Witness excused.)

[fol. 360] BOB EZELL sworn and testified as follows:

Direct examination.

By General Gerber:

Q. Your name, please?

A. Bob Ezell.

Q. You are connected with the Attorney General's office and have been for how many years?

A. Since the spring of 1941.

Q. I will ask you to state to the jury if you participated in the investigation of the Asheraft murder?

A. I did, yes, sir.

Q. I will ask you if at any time you went out to the home of John Ware for the purpose of bringing him to this jail?

A. I did.

Q. State to the jury if on that occasion anybody struck or abused or cursed him?

A. No, sir.

Q. Was he cursed or struck or abused at any time thereafter?

A. No, sir.

Q. Did anybody put him in a padded cell before he made his statement?

A. Ware wasn't taken off the fifth floor until he was turned over to the jailor.

Q. Did you accompany Mr. Becker to the scene of this crime on Tuesday, after the statement was made by Ware on Monday?

A. Yes, sir.

Q. Did Mr. Becker stick his pistol in Ware's mouth?

A. No, sir.

[fol. 361] Did you make any statement about collecting a reward?

A. No, sir.

Q. Had there been any reward offered?

A. None that I know of.

Q. Did you or anybody else say to Ware that if he didn't make a statement he would be turned over to a mob?

A. No, sir.

General Gerber: That's all.

Mr. McCormick: No questions.

(Witness excused.)

W. PRESTON BATTLE sworn and testified as follows:

Direct examination.

By General Gerber:

Q. Mr. Battle, you are assistant Attorney General connected with the District Attorney General's office, Shelby County?

A. Yes, sir.

Q. How long have you been assistant Attorney General?

A. A little over ten years.

Q. I will ask you to state to the jury if you participated in the investigation of the Ashcraft murder?

A. I did.

Q. I will ask you whether you were present in the home of Ware when he was identified by the defendant Ashcraft at Ware's home on Oriole Street?

A. I was.

Q. State whether anybody at that time struck Ware?

A. They did not.

[fol. 362] Q. I will ask you if at any time after Ware was brought to this jail he was taken off the fifth floor before he made his statement?

A. He was not.

Q. I will ask you if anybody in your presence threatened to turn him over to a mob?

A. They did not.

Q. I am sure you are familiar with the statement which has been introduced in evidence as exhibit "N" to the testimony of Mr. Becker?

A. I am.

Q. State to the Jury who made all the answers appearing in that statement?

A. Ware.

Q. State whether or not anybody suggested any of those answers?

A. This statement was in his exact words.

General Gerber: Take the witness.

Cross-examination.

By Mr. Bickers:

Q. It has been testified to by Mr. Becker in this case that on June 14th the defendant E. E. Ashcraft was brought to the jail about 7:00 o'clock.

A. Correct.

Q. And you and Mr. Becker examined him for several hours?

A. That is true.

Q. And that he became tired and you all turned him over to Mr. Ezell?

[fol. 363] A. We left about 3:00 o'clock in the morning and went to the dormatory to lie down.

Q. When did you take over again?

A. In the neighborhood of 6:00 or 7:00 o'clock Sunday morning.

Q. And then you and Mr. Becker examined him until noon Sunday?

A. About noon?

Q. Then someone else took over?

A. We left around noon and went home.

Q. Did any other officer take over to examine him when you left?

A. I didn't see anyone in the office when we left.

Q. Was Mr. Ashcraft asleep when you left?

A. No, sir.

Q. Did he sleep at any time while you were examining him?

A. No, sir.

Mr. Bickers: That is all.

Cross-examination.

By Mr. McCormick:

Q. Who is the Public Defender of Shelby County?

A. Mr. Hugh Stanton at this time.

Q. There was a Public Defender in June of 1941?

A. I am sure there was.

Q. He is a paid lawyer, paid by the county, to represent poor people?

A. That is my understanding, yes, sir.

Q. He wasn't called in this investigation at all.

A. No, sir, he wasn't requested.

Q. He wasn't up there?
A. No, sir.

(Witness excused.)

[fol. 364] Mrs. H. L. Jayroe sworn and testified as follows:

Direct examination.

By General Gerber:

Q. You are Mrs. H. L. Jayroe?
A. Yes, sir.
Q. You are the wife of Mr. H. L. Jayroe, a deputy connected with the Sheriff's office of Shelby County, Tennessee in 1941?
A. Yes, sir.
Q. Where is your husband now?
A. In the Marine Corps, in the Pacific.
Q. When was the last time you heard from him?
A. Yesterday I received two letters.
Q. Was he in the Pacific Theatre of War then?
A. Yes, sir.

General Gerber: That is all.

(Witness excused.)

General Gerber: In view of the testimony of Mrs. Jayroe, we want to offer the testimony of Mr. Jayroe given at the last trial.

(Testimony of H. L. Jayroe, last trial, read:)

"Afternoon Session: 1:45 P. M.

H. L. Jayroe called as rebuttal witness for the State being first duly sworn testified as follows:

Direct examination.

By General Gerber:

Q. Your name, please, sir?
A. H. L. Jayroe.
Q. You are connected with the Sheriff's office?
A. Yes, sir.

[fol. 365] Q. What position do you hold at this time?

A. In charge of the homicide department.

Q. Are you ill at this time?

A. Yes, sir.

Q. You came here out of a sick bed?

A. Yes, sir.

Q. Mr. Jayroe, in June of 1941, June 16, 1941, on the early morning, Monday morning, you had occasion to go out to the home of John Ware when he was picked up?

A. Yes, sir.

Q. I want to ask you if anybody struck him on that occasion?

A. No, sir.

Q. Did you on that night go in the home of a woman named Henrietta Fredericks?

A. We went into a negro's house; it was George Pryor's house.

Q. You didn't go in the Fredericks woman's house?

A. No, sir.

Q. State whether you accompanied the officers up to the 5th floor—whether, after the officers took John Ware to the 5th floor of this jail, he was taken by any officers, Becker or Ezell or anybody else, off the 5th floor?

A. No, sir, not to my knowledge.

Q. Did Mr. Ezell do that in your presence?

A. No, sir.

Q. Did any of the officers in your presence, take Ware and place him in a padded cell?

A. No, sir.

Q. State whether you, or any one else in your presence, ever told Ware that if he didn't tell Mr. Becker that he killed this woman, he would be turned over to a mob?

A. That's absolutely untrue.

Witness excused.

General Gerber: The State Rests.

This was all the evidence in the case.

[fol. 366] Mr. Bickers: I want to make a motion for the defendant E. E. Ashcraft.

The Court: Gentlemen, I am going to excuse you again.

Jury out.

Mr. Bickers: Your Honor, I want to renew my motion made at the conclusion of the State's proof in chief in this case. Now the record discloses that motion. That has already been put in the record. Your Honor is familiar with it and I want to renew that motion that the Court direct the Jury to bring in a verdict in behalf of the defendant Ashcraft, coupled with this motion that I have made. I adopt that motion in this one.

The Court: Overruled.

Mr. Bickers: Note my exception.

Mr. McCormick: If your Honor please, at the close of all the proof, that being the state of the record, I want to renew the motions that I made at the close of the State's proof, which is in the record, as well as to renew my other motions made at the preliminary hearing first in this case, heard across the street. The court recognizes the motion I am making and I believe in the beginning of the trial I incorporated those motions into this record formally.

The Court: It was a little later in the trial, not in the beginning.

Mr. McCormick: And I want to move the Court, in addition, to strike from the record any evidence or statements appearing in the record as coming from the defendant Ash-
[fol. 367] craft and tending to connect John Ware with this murder. The Court sees what I am driving at there—any statements which might have been made either directly or indirectly as having come from Mr. Aschraft would not be competent as against John Ware in this case. There are two or three pieces of evidence in there that I think ought to come out. I made my objection at the time and I believe the Court overruled me. I am quite sure you did but I don't want to take any chances.

The Court: Didn't I instruct the Jury that any statement made by Ashcraft were not to be considered against the defendant Ware?

Mr. McCormick: I believe you did but out of an abundance of caution I am incorporating it at the close of all the proof.

Mr. Bickers: I understand your Honor will charge the jury the same thing.

General Gerber: We join in that request that the jury be so charged.

The Court: I overrule Mr. McCormick's motion.

Mr. McCormick: Note my exception.

The Court: Note an exception for Mr. Bickers.

Mr. Bickers: Note my exception.

General Gerber: Can we have a little conference while the jury is out?

The Court: If there is going to be any controversy come up between you gentlemen during the argument, you should try to settle it at this time, because I would hate to interrupt either of you while in the course of your argument.

(Conference of counsel.)

[fol. 368] COLLOQUY

General Gerber: If your Honor please, in the absence of the jury, for the purpose of expediting the argument, and feeling that we did not want to interrupt counsel in their argument, we have had a conference with them in reference to the admissibility of certain parts of the opinion of the Supreme Court of the United States. We take the position that it is improper to read any facts in any of the opinions of the Supreme Court to the jury in argument. We have no objection to reading any law that counsel wants to read to the jury, but under the law they do not have a right to get up here before this jury and tell this jury what Hugo Black said to Nat Tipton and what Nat Tipton said to Hugo Black about this case; and I want to submit to your Honor the case of Smithson vs. State, reported in 127 Tennessee at page 359, which I think is on all fours with this case.

"This case is before this court a second time on a conviction at a third trial for the crime of manslaughter and assessment of punishment at two years in the penitentiary. The opinion of this court on the formal appeal is reported in 124 Tenn. 218. * * * On the trial of the court below, counsel for State, "—we are doing the same thing in this case—" in advance of the production of any evidence, asked that the jury be caused to retire, in order to a submission to the trial judge of a motion. In the absence of a jury, counsel for the State stated that they had been informed that counsel for the defendant purposed reading to the jury in the argument of the case this court's opinion so reported, that the prosecution objected to such reading, and it was moved that the court rule in advance respecting same. The

court stated that such reading would be improper, since the court in that opinion commented on the facts relating to the motives of the deceased and of plaintiff in error, as disclosed on such former trial, but stated that he would rule on the question if and when the defendant's counsel offered to read the opinion, which they had just asserted their intention to do. Thereafter, there was no such offer or effort made. For this reason there is no error, under the assignment.

But, on broader grounds, the ruling of the trial Judge was [fol. 369] not erroneous, in that it was within his sound discretion to deny the reading of the opinion so treating of facts and motives; and we think his indicated ruling would have been far from being improper."

And so we say, if your Honor please, in a case of this kind counsel have no right to read any facts from any opinion in this case. And we offer this Smithson case, which is the last in Tennessee, on our proposition. We do not want to be placed in the position of objecting while counsel are arguing or to do anything that would interfere with the argument of counsel, and possibly distract them from their argument, and we say that what Nat Tipton said to Hugo Black or what Hugo Black said to Nat Tipton cannot be related to this jury by the reading of that opinion.

The Court: Let me see that book.

(Court examines 127 Tennessee.)

The Court: What do you say to that, Mr. Bickers and Mr. McCormick?

Mr. Bickers: Nothing at this time.

Mr. McCormick: I don't intend to refer, so far as this opinion is concerned, to any of the facts set out in this opinion with reference to the alleged confession of Ashcraft; but I do intend, and I most earnestly insist to the court that I have a right to read the conclusions of law and part of what the Supreme Court has said further in this opinion.

The Court: Let me understand you gentlemen. General Gerber, Mr. McCormick states that he does not intend to do anything that you anticipate.

[fol. 370] General Gerber: We say it is improper for these lawyers to argue what Hugo Black said to Nat Tipton,

or to discuss any facts. Any conclusions of law are competent.

Mr. McCormick: Mr. Gerber is using Justice Hugo Black. Justice Black simply wrote the opinion.

General Gerber: Anything he says on the law is competent.

Mr. McCormick: He says plenty and it applies right to this case, because I say to the Court right now that this is our lawsuit—Part of it—right here. It is part of this case, facts and all, and I think it would be error for the court to hold that we are limited to reading certain portions of this opinion, because I think we have a right to read every word of it, because it is a part of this case, a part of this record. We have the same witnesses; there wasn't a new witness put on the stand, not a one. We have the same facts involved here and they are trying to convict on the same facts with reference to both defendants. There is no controverting that statement, and I want to say to this Court that these men have a right to be heard, and that is their constitutional rights; and there are few limitations put on a man's constitutional rights when his life is at stake. It is perfectly ridiculous to say that while over here in the Circuit courts, with nothing but property rights involved, a lawyers can pick up books containing cases from all over the United States and read the facts and conclusions of law that are drawn from those facts, the lawyers for these men would be barred from reading this opinion which is a part of this very case.

[fol. 371] General Gerber: In this opinion by Mr. Justice Black, he made use of this language: "Upon oral argument before this Court Tennessee's legal representatives conceded that the convictions could not be sustained without the confessions but defended their use upon the ground that they were not compelled but were 'freely and voluntarily made.'"

We say it would be improper to read that statement to this jury, and every other fact statement is improper and incompetent to be read to this jury, and we say that on the authority which we have read to your Honor. We agree that they have a right to read the law but they have no right to read the facts out of the opinion.

The Court: I thought you gentlemen were in accord when we started here. Now, Mr. McCormick, I don't agree with

the statement you made that in the Circuit Court we follow the rule that you can discuss facts stated by the Supreme Court of the State in some other lawsuit. That is not the practice. It is limited to a discussion of the law.

In this case, it is the opinion of the Court that it would be improper to make any mention of the facts referred to by the Supreme Court in the opinion which has been mentioned.

I have heard Ashcraft's confession mentioned, but I don't know what Ashcraft's confession was. We have kept it out. It is the ruling of this Court that it will be improper to discuss or make reference to any facts referred to by the Supreme Court in the opinion referred to and I want you gentlemen to respect that finding. You can note your exception, Mr. McCormick.

Mr. McCormick: Note my exception.

Mr. Bickers: Note my exception.

The Court: Very well. Note an exception for Mr. McCormick and Mr. Bickers.

[fol. 372] JURY IN

Counsel for the parties hereto thereupon argued their respective contentions, when and where the Court charged the jury as follows:

[fol. 373] [Title omitted]

CHARGE OF THE COURT

GENTLEMEN OF THE JURY:

The indictment in this case contains two counts. The first count of the indictment charges both of the defendants with the offense of Murder in the First Degree. The second Count of the indictment charges the defendant, Ashcraft, with being an Accessory before the Fact to Murder in the First Degree.

Insofar as the defendant, Ashcraft, is concerned, you will disregard the first count of the indictment, since if he is guilty at all, he is only guilty under the second count of the indictment.

While the first count of the indictment only charges murder in the first degree, it embraces four distinct felonious homicides, to-wit, Murder in the First Degree, Murder in the

Second Degree, Voluntary Manslaughter and Involuntary Manslaughter.

The Second Count of the Indictment charging the defendant, Ashcraft, with being an Accessory Before the Fact to Murder in the First Degree, also embraces the offense of Accessory Before the Fact to Murder in the Second Degree.

The law makes it the duty of the court to give in charge to the jury the law relative to the case on trial, and of the jury to carefully consider all the evidence delivered to them on the trial, and, under the law given them by the Court, render their verdict with absolute impartiality.

The jury, in no case, should have any sympathy or prejudice, or allow anything but the law and the evidence to have an influence upon them in determining their verdict.

[fol. 374] Without reference at present to the facts of this case, I will now give you the law relative to the charge in this indictment.

Murder is thus defined: "If any person, of sound memory and direction, unlawfully kill any reasonable creature in being, and under the peace of the State, with malice aforethought, either express or implied, such person shall be guilty of murder."

From this definition, it is clear that *malice* is an essential ingredient of murder.

Malice is an intent to do an injury to another; a design formed in the mind of doing mischief to another.

A case of homicide cannot be murder unless at and before the killing the wicked intent, constituting malice aforethought, exists in the mind of the slayer.

Malice is either express or implied. In homicide, express malice is malice against the person killed.

Implied malice is malice not against the party slain, but malice in general, or that condition of the mind of the slayer which indicates a wicked, depraved and malignant spirit, and a heart regardless of social duty and fatally bent on mischief.

Murder in the First Degree

Murder in the first degree is thus defined:

"Every murder perpetrated by means of poison, or lying in wait, or by any other kind of willful, deliberate, malicious and premeditated killing, or committed in the perpetra-

tion of, or attempt to perepetrate any murder in First Degree, arson, rape, robbery, burglary or larceny, is murder in the first degree."

When the act of killing is not done in the commission of, or attempt to commit, some one of the felonies named in the definition of murder above, nor by poison, nor by lying in [fol. 375] wait, in order to make it murder in the first degree, the killing must be done *Willfully*, that is, of purpose, with the intent that the act by which the life of the party is taken should have that effect; *Deliberately*, that is with a cool purpose; *Maliciously*, that is, with malice aforethought; and with *Premeditation*, that is, a design to kill must be formed cooly and deliberately and before the act is performed by which death is produced, and the killing must be the cool and deliberate act of the slayer.

This is the distinctive feature of murder in the first degree. It is not necessary that the cool and deliberate design to kill should have been conceived or pre-existed for any definite period of time anterior to the killing. It is sufficient if it precede the killing, howsoever short the interval of time may be; for the length of time is not the essence of this element of this offense. The purpose to kill is no less premeditated, in the legal sense of the term, if it was deliberately formed but a moment before the killing, than if it had been formed an hour before. The mental state of the slayer at the time of the killing, rather than the length of time the act may have been premeditated, is the material point to be considered. The question of importance is, Was the mind of the slayer, at the time of the killing, so far free from excitement or passion as to be capable of premeditation, as before explained, and was the death of the party slain the object sought to be accomplished by the slayer?

Accessory Before the Fact

An Accessory Before the Fact to Murder in the First Degree is one who feloniously moves, incites, counsels, hires, commands or procures another to commit murder by means of poison or by lying in wait or by any other kind of wilful, [fol. 376] deliberate, malicious, or premeditated killing, or to commit it in the perpetration of, or attempt to perpetrate, any murder in the first degree, Arson, Rape, Robbery, Burglary or Larceny.

An Accessory Before the Fact to Murder in the Second Degree, is one who feloniously moves, incites, counsels, hires, commands and procures, another to unlawfully, feloniously, wilfully and maliciously, kill any person upon a sudden impulse of passion and without adequate provocation.

Murder in the Second Degree

Malice is an essential ingredient of murder in the second degree, and may be either express or implied. A man may intentionally kill another under such circumstances that will make the killing murder in the second degree. If one person, upon a sudden impulse of passion, without adequate provocation, and disconnected with any previously formed design to kill, kills another wilfully and maliciously, such killing will be unlawful, and will be murder in the second degree, although the slayer is actuated by express malice against the party killed.

As before stated, implied malice may be an essential element of murder in the second degree. This is where the slayer does not intend to slay the person killed. This occurs where a party does an unlawful act, which may probably result in depriving some person of life, or performs an act, lawful in itself, in such a reckless and careless manner that it may probably result in depriving some person of life, and if, in such case, some person is killed, the person thus causing the death will be guilty of murder in the second degree.

In such case the law regards the conduct of the party causing the death, of such a character as to indicate a depraved and wicked mind and heart, regardless of social [fol. 377] duty, and fatally bent on mischief, and hence says that when death is thus caused the party thus causing it is guilty of murder in the second degree; that is, murder in which implied malice is the essential element.

If the slayer with premeditated intent to slay a certain person, by misadventure and undesign, slay another person, such slaying will be murder in the first degree.

Malice aforethought, as applied to the crime of murder in the second degree, covers all cases where the act is done under such cruel circumstances as are the ordinary indications of a wicked, depraved and malignant spirit, as when the punishment inflicted by a party, even upon provocation, is outrageous in its nature and continuance, and beyond all

proportion to the offense, so that it is to be attributed to malignity and brutality rather than human infirmity.

Where the use of a deadly weapon by the party killing is shown, and the death is clearly shown in the proof to have resulted from its use by the slayer, the use of such weapon may be considered by the jury to establish that the killing was done maliciously; that is, with that malice required to support murder in the second degree. But where the death and its manner, and all the surrounding and accompanying circumstances, are shown in the proof, then malice is not presumed, but the jury are to determine from them whether or not it was present as an ingredient of the offense.

Malice cannot be inferred from the deadly intent merely, because the deadly intent may be justifiable under the law; as when one wilfully kills another to save his own life, or to save himself from great bodily harm, and the danger is imminent and immediate; or when the intent to kill is produced by anger; for if it were sudden and upon reasonable provocation, the killing would not be murder, but manslaughter.

[fol. 378] Voluntary Manslaughter

If one man kills another upon a sudden heat, produced by adequate provocation, as if upon a sudden quarrel two persons fight and one kills the other, this is voluntary manslaughter; and, in general, if a person that is struck strikes again, and death ensues from the blow, it is voluntary manslaughter, the law regarding the blow sufficient provocation to excite the passion, and the act of killing will be imputed to heat of blood and passion, rather than malice, if no undue advantage be taken by the party doing the killing. The sudden heat, which is the distinguishing characteristic of this offense, must be produced by adequate provocation, the true general rule being that reason must, at the time of the act, be disturbed by passion to an extent which might render ordinary men, of fair average discretion, liable to act rashly, or without due deliberation or reflection, and from passion rather than judgment. If the act of the defendant charged in this case was the result of impulse of passion, excited upon sudden heat and adequate provocation, the idea of malice is repelled and the killing is voluntary manslaughter.

Involuntary Manslaughter

Involuntary manslaughter is where it plainly appears that neither death nor bodily harm was intended by the party killing, and that death was accidentally caused by some unlawful act, or by some act not strictly unlawful in itself, but done in a reckless and unlawful manner and without due caution, and that death was the natural or probable result of such act.

Any person, who shall feloniously, move, incite, counsel, hire, command or procure any other person to commit a felony, is an Accessory Before the Fact.

An Accessory before the Fact to Murder, tried with the [fol. 379] principal, shall be punished as the principal is punished, but his punishment shall not exceed the maximum punishment given the principal.

Punishment

The punishment for murder in the first degree is Death by Electrocution, unless the jury are of the opinion that there was mitigating circumstances, in which event the jury may commute the punishment to imprisonment for life in the penitentiary of the State, or to not more than a definite period of time, not less than twenty years and a day nor more than life.

The punishment for murder in the second degree is imprisonment in the State Penitentiary for not more than a certain period of time not less than ten nor more than twenty years.

The punishment for voluntary manslaughter is confinement in the State Penitentiary for not more than a certain period of time not less than two nor more than ten years.

The punishment for involuntary manslaughter is imprisonment in the State Penitentiary, for not more than a certain period of time not less than one nor more than five years; or the jury may fix the punishment at confinement in the County Work House for any period less than one year.

The court charges you gentlemen of the jury that to render one guilty as an accessory before the fact, he must have had the requisite criminal intent. He need not, however, necessarily have intended the particular crime committed by the principal; an accessory is liable for any crimi-

nal act which in the ordinary course of things was the natural or probably consequence of the crime which he counseled or commanded. Although such consequence may not have been intended by him.

The Court instructs the Jury that if a verbal or written [fol. 380] statement voluntarily made of the defendant Ware has been proven in this case, you may take it into consideration with all the other facts and circumstances proven. What the proof may show you, if anything, that the defendant Ware has said against himself, the law presumes to be true but anything the defendant Ware has said in his own behalf, you are not obliged to believe, but you may treat the same as true or false when considered with a view to all the other facts and circumstances in the case. In statements made at the time of arrest, you may take into consideration the condition of the mind of the prisoner owing to his arrest and whether he was influenced by motives of hope or fear, to make the statements. Such a statement is competent evidence against the defendant who makes it and is not competent evidence against the other defendant, and you can only consider it as to the defendant making it. You cannot consider it for any purpose against the other defendant.

Now, Gentlemen of the Jury, there has been introduced in evidence in this case testimony that the defendant Ware orally admitted his guilt of the charge the state charges him with; there has also been introduced in evidence a written confession on the part of the defendant Ware in which he admits his guilt of the offense charged against him.

Now, in respect to these oral and written admissions of guilt on the part of the defendant Ware, it is the contention and theory of the State that such confessions were freely and voluntarily made on the part of the defendant Ware; that such oral and written confessions of guilt were not made through any hope or fear; that the confessions were not obtained through violence, or threat of violence, and that such oral and written confessions of guilt were not obtained through any offer of reward or immunity; that such confessions, as aforestated, were freely and voluntarily made.

[fol. 381] Now, Gentlemen of the Jury, on the other hand, it is the theory and contention of the defendant Ware that such oral and written confessions were not freely and volun-

tarily made; that such confessions were procured from him through violence and threat of violence, practiced upon him by the Officers in charge of him; that such confessions were obtained through fear and as aforesaid that the said confessions of guilt were not freely and voluntarily made.

Now, Gentlemen of the Jury, the burden is upon the State to prove its contentions and theory in reference to these confessions and admissions of guilt on the part of the defendant Ware, beyond a reasonable doubt.

Now, Gentlemen of the Jury, if you find from the evidence beyond a reasonable doubt that the admissions and confessions of guilt on the part of the defendant Ware were freely and voluntarily made by him; that they were not made through any hope or fear; that they were not obtained through violence or threat of violence; that such admissions and confessions of guilt were obtained without any hope of reward or offer of immunity; and, as aforestated, if you find beyond a reasonable doubt that such confessions and admissions were freely and voluntarily made by the defendant Ware, then you may consider such admissions and confessions along with all the other facts and circumstances in the case as to the defendant Ware.

On the other hand, Gentlemen of the Jury, if you find from the evidence that such confessions and admissions of guilt on the part of the defendant Ware were not freely and voluntarily made, or if you have a reasonable doubt thereof; or that such admissions and confessions were obtained through violence or threat of violence, or if you find that such confessions and admissions were obtained [fol. 382] through fear, or if you find that said confessions and admissions of guilt were obtained by offer of immunity or hope of reward, or if you have a reasonable doubt as to any of these matters; or, as aforesaid, if you find that these confessions and admissions of guilt on the part of the defendant Ware were not freely and voluntarily made, or have a reasonable doubt thereof, you will not consider such admissions and confessions for any purpose.

Now, Gentlemen of the Jury, in the written confession of the defendant Ware, which has been read in evidence, there were references to the defendant Ashcraft. The Court instructs you, Gentlemen of the Jury, that you must not consider any part of said written confession of the defendant Ware as to the defendant Ashcraft.

A defendant may or may not testify in his own behalf and his failure to testify shall not create any presumption against him. The Jury shall draw no inference at all from his failure to testify.

You are the sole judges of the facts. Expert witnesses have been allowed to testify as to the presence of certain foreign substances in the body of the deceased, and other matters, and to state their opinions. With reference to this testimony, which you should consider and judge along with all the other proof, I charge you that it should be received with caution. While this kind of testimony is sometimes the only means, or the best way to reach the truth, yet it is largely a field of speculation, beset with pitfalls and uncertainties, and requires patient and intelligent consideration to reach the truth. You should give it the same consideration as all the other proof, governed by the same rules to arrive at the truth, giving fair consideration as to all the proof.

If one person moves, incites, counsels, hires, commands or procures another to commit murder and said person com- [fol. 383] mits the murder in pursuance thereto, said second person would be a competent witness against the one accused of having incited, counseled, hired, commanded or procured him to commit the murder, and the Jury are the triers of his credibility as a witness in determining what weight they will give his testimony; but the Jury should take his testimony with a great deal of caution and scrutinize it with care and the Jury cannot convict the defendant upon his testimony unless there is evidence in the case independent of his testimony which independent evidence tends to show that the defendant on trial did incit-, counsel, hire, command or procure him to commit the murder. Evidence independent of his testimony necessary to corroborate his testimony and authorize a Jury to convict the defendant upon his testimony need not extend to the whole body of his testimony, nor need it be sufficient of itself to establish the defendant's guilt. It is sufficient, if without the aid of his testimony, it tends to show the commission of the offense charged, and the connection of the defendant with the offense. If it be shown by evidence independent of his testimony that he has told the truth in some material matters, the Jury may infer that he has in other material matters. The Jury are the sole judges of whether or not

he was by the defendent incited, counseled, hired, commanded or procured to commit the offense and whether or not there is evidence independent of his testimony tending to show the commission of the crime and the connection of the defendant therewith, and whether or not such independent evidence, if any, is sufficient, taken to-gether with his testimony, to cause the Jury to believe beyond a reasonable doubt that he has spoken the truth and that the defendant is guilty of the offense charged.

Good Character

You will consider the evidence of good character offered on behalf of the defendants along with all the other facts and circumstances in the case.

[fol. 384] A man of good character, may, of course, violate the law, but all other things being equal, a man of good character is not so likely to violate the law as one of bad character.

If you find that the defendant Ware had on some previous occasions been convicted of some minor offense, you can only consider it as affecting his credibility as a witness. You cannot allow it to weaken his presumption of innocence in the case on trial.

State's Theory

The theory of the State is that on the early morning of June 5th, 1941, the defendant, E. E. Ashcraft, feloniously hired, counseled, incited, commanded and procured the defendant Ware to take the deceased from her home at 3520 Stanton Street in Shelby County, Tennessee, to a place some distance away and there unlawfully, feloniously, maliciously, wilfully, deliberately and premeditatedly kill and murder her. That in pursuance of that agreement, the defendant Ware did, at the time stated above, take the deceased, Zelmar Ida Ashcraft, from her home to a body of water near Raleigh, Tennessee, and there unlawfully, wilfully, feloniously, maliciously, deliberately and premeditatedly killed her by hitting her in the head with some blunt instrument.

If you find from the evidence, beyond a reasonable doubt, that the defendant Ware unlawfully, willfully maliciously deliberately, and premeditatedly killed Zelma Ida Ashcraft as charged in the indictment, your verdict should be, "We, the jury, find the defendant Ware guilty of Murder

in the First Degree, as charged in the indictment, and fix his punishment at Death by Electrocution," unless you are of the opinion there were mitigating circumstances, in which event you may commute the punishment to life in the Penitentiary or for not more than a definite period of time, over twenty years.

[fol. 385] If you find from the evidence, beyond a reasonable doubt, that the defendant Ware upon a sudden impulse of passion, without adequate provocation, unlawfully, wilfully, and maliciously killed Zelma Ida Ashcraft, as charged in the indictment, your verdict should be: "We, the jury, find the defendant Ware guilty of Murder in the Second Degree, as charged in the indictment, and fix his punishment at impri-onment in the Penitentiary for not more than a definite period of time designating the maximum term which the defendant may be required to serve at a definite period of time between ten and twenty years.

If you find from the evidence beyond a reasonable doubt that the defendant Ware, upon a sudden impulse of passion, excited by sudden heat and adequate provocation unlawfully and wilfully killed Zelma Ida Ashcraft, as charged in the indictment, your verdict should be, "We, the jury, find the defendant Ware guilty of Voluntary Manslaughter, as charged in the indictment, and fix his punishment at imprisonment in the Penitentiary for not more than a definite period of time designating the maximum term which the defendant may be required to serve at a definite period of time between two and ten years.

If you find from the evidence beyond a reasonable doubt that the defendant Ware unlawfully killed Zelma Ida Ashcraft, as charged in the indictment, and it plainly appears that neither death nor bodily harm was intended, and that death was accidentally caused by some unlawful act on the part of the defendant Ware, or by some act not strictly unlawful in itself, but done in a reckless and unlawful manner, and without due caution, and that death was the natural or probable result of such act, your verdict should be: "We, the jury, find the defendant Ware guilty of Involuntary Manslaughter, as charged in the indictment, and fix his punishment in the Penitentiary for not more than a definite period of time designating the maximum term which [fol. 386] the defendant may be required to serve at a definite period of time between one and five years unless

you think it should be less, in which event you can fix it at any time in the county workhouse, under 12 months.

It is insisted on behalf of the State that the facts and circumstances in support of its theory are sufficient to convince you beyond a reasonable doubt and to the exclusion of every other reasonable hypothesis than that of guilt, of the guilt of the defendant E. E. Asheraft.

If you find from the evidence beyond a reasonable doubt that the facts and circumstances in support of the theory of the State are true and that they are not only consistent with the guilt of the defendant Asheraft, but inconsistent with his innocence and cannot be explained, upon any other reasonable hypothesis than that of his guilt, that is, that he, E. E. Asheraft, feloniously moved, incited, counseled, hired, commanded or procured the defendant Ware to unlawfully, wilfully, maliciously, deliberately and premedi-atedly kill and murder the deceased, Zelma Ida Asheraft, your verdict should be "We, the Jury, find the defendant, E. E. Asheraft, guilty as an Accessory before the Fact to Murder in the First Degree as charged in the second count of the indictment, and fix his punishment at death by electrocution, unless you are of the opinion there were mitigating circumstances, in which event you may commute the punishment to Life in the Penitentiary of the State, or for not more than a definite period of time over twenty years and life."

If you find from the evidence beyond a reasonable doubt, that the facts and circumstances in support of the theory of the State are true and that they are not only consistent with the guilt of the defendant Asheraft but inconsistent with his innocence and cannot be explained upon any other reasonably hypothesis than that of his guilt and that he, [fol. 387] E. E. Asheraft, feloniously moved, incited, counseled, hired, procured or commanded the defendant Ware to unlawfully, wilfully and maliciously kill Zelma Ida Asheraft upon a sudden impulse of passion and without adequate provocation, as charged in the indictment, your verdict should be, "We, the Jury, find the defendant E. E. Asheraft, guilty as an Accessory Before the Fact to Murder in the Second Degree as charged in the second count of the indictment, and fix his punishment at imprisonment in the Penitentiary of the State for not more than a definite period of time designating the maximum term which he

may be required to serve at a definite period of time between ten and twenty years.

The Theory of the Defendant Ware is that he has plead not guilty to the charge; that he is not guilty of any crime and that the State has failed to prove his guilt beyond a reasonable doubt and to a moral certainty.

The Theory of the Defendant Ashcraft is that he has plead not guilty to the charge; that he is not guilty of any crime and that the State has failed to prove his guilt beyond a reasonable doubt and to a moral certainty and to the exclusion of every other reasonable hypothesis other than that of his guilt.

You may convict both defendants if you are satisfied as to their guilt under these instructions. If you have a reasonable doubt as to the guilt of the defendant Ware, you should acquit both defendants. If you are satisfied that the defendant Ware is guilty in accordance with these instructions and you are not satisfied as to the guilt of the defendant Ashcraft in accordance with these instructions, you should convict the defendant Ware and acquit the defendant Ashcraft.

[fol. 388] You will write the defendants' names to your verdict and sign one of your names to your verdict as Foreman.

II

Presumption of Innocence

You enter upon this investigation with the presumption that each of the defendants is not guilty of any crime, and this presumption stands as a witness for each of them until it is rebutted and overturned by competent and credible proof. It is, therefore incumbent upon the State, before you can convict the defendant, to establish, to your satisfaction, beyond a reasonable doubt—

1st. What the law calls the *corpus delecti*, the body of the crime; that is, that Zelma Ida Ashcraft has been killed.

2nd. The venue; that is, that she was killed in the County of Shelby, and State of Tennessee, and before the finding of this indictment.

3rd. That the prisoners at the bar killed her, and that the killing was done in such manner, by such means, and under such circumstances as would make them guilty under

the law of some one of the grades of felonious homicides heretofore defined and explained to you.

Reasonable Doubt

By reasonable doubt is meant, not that which, of possibility, may arise, but it is that doubt engendered by an investigation of the whole proof, and an inability after such investigation to let the mind rest easily upon the certainty of the guilt. Absolute certainty of guilt is not demanded by the law to convict of any criminal charge, but moral certainty is required. And this certainty is required as to every proposition of proof requisite to constitute the offense, and as to every grade of crime charged or included [fol. 389] in the indictment.

Impeaching a Witness

There are several modes of impeaching a witness. One mode is to prove by credible witnesses that they know the general character of the assailed witness, and from that general character they would not believe him or her on oath in a court of justice. The fact that the character of the witness is assailed by a single witness casts a reproach upon him, and when the general character of the witness is assailed upon the one hand and sustained upon the other by witnesses, it then becomes a question to be decided upon by the Jury, like all other questions of fact, and it is not to be judged by the number of witnesses for or against, but by their respectability, intelligence, consistency and means of information.

Another mode is to prove that a witness has, at different times, made conflicting statements as to the material facts of the case as to which he testifies.

Still another mode is by a rigid and close cross-examination to involve the witness in contradi-tions and discrepancies as to the material facts stated by him. Immaterial discrepancies or differences in the statements of witnesses do not affect their credibility, unless there is something to show that they originated in wilful falsehood, and you, gentlemen of the Jury, are to determine how far the testimony of any impeached witness has been impaired by any invalidating process.

Credibility of Witnesses

You will take all the evidence adduced in this case by the State and by the defendants and give it a full, fair and impartial consideration. If there are conflicts in the statements of different witnesses, it is your duty to reconcile them, if you can, for the law presumes that every witness [fol. 390] has sworn to the truth; but if you cannot, the law makes you the sole and exclusive judges of the credibility of the witnesses, and the weight to be given their testimony. In forming your opinion as to the credibility of the witness, you may look to the proof, if any, of his general character, the manner and demeanor of the witness, the consistency or inconsistency of the statements, their probability, or improbability, his ability and willingness to speak the truth, his intelligence and means of knowledge, his motive to speak the truth or swear a falsehood.

When the defendant makes himself a witness in his own behalf, his credibility is to be determined by the same rules that the credibility of other witnesses is determined, and you will give to the defendant's testimony in this case such weight as you may think it entitled to.

Circumstantial Evidence

Circumstantial evidence is when there is no eye witness to the crime. A jury may convict a defendant upon circumstantial evidence, and it is their duty to do so in proper cases. In proper cases, it is as much their duty to convict on circumstantial evidence as upon positive and direct evidence. But before a jury would be justified in finding a defendant guilty upon circumstantial evidence, they must be satisfied, from the evidence beyond a reasonable doubt, of the guilt of the defendant, and that the evidence is not only consistent with his guilt, but inconsistent with his innocence, and that the evidence excludes every reasonable hypothesis but the hypothesis of guilt; and, as before explained to you, you cannot consider anything but the evidence in the case, in determining the question of reasonable doubt, or as to whether there is any other reasonable hypothesis than the hypothesis of the guilt of the defendant.

[fol. 391] Verdict

When you retire to consider of your verdict, you will first inquire: Is the defendant Ware guilty of Murder in the First Degree?

If you find from the evidence beyond a reasonable doubt, the defendant Ware guilty of Murder in the First Degree, as charged in the indictment, you will fix the penalty at Death by Electrocution, unless you are of the opinion there were mitigating circumstances, in which event you may commute the punishment to imprisonment for life in the Penitentiary of the State, or for not more than a definite period of time between twenty years and a day and life.

If you find the Defendant Ware not guilty of Murder in the First Degree, or if you have a reasonable doubt as to his guilt of that crime, you will acquit him of that offense, and proceed to inquire whether or not he is guilty of Murder in the Second Degree.

If you find from all the proof, beyond a reasonable doubt, that the defendant Ware is guilty of Murder in the Second Degree, you will access the maximum term of his confinement in the Penitentiary of the State at not more than a definite period of time, between ten and twenty years.

But, if you should find the defendant Ware not guilty of Murder in the Second Degree, or if you have a reasonable doubt of his guilt thereof, you will acquit him of that offense, and proceed to inquire whether or not he is guilty of Voluntary Manslaughter.

If you find him guilty of that offense, beyond a reasonable doubt, you will assess the maximum term of his confinement in the Penitentiary at not more than a definite period of time, between two and ten years.

If you should find him not guilty of Voluntary Manslaughter, or you have a reasonable doubt of his guilt [fol. 392] thereof, you will acquit him of that offense, and proceed to consider whether he is guilty of Involuntary Manslaughter, and if you should find from the proof, beyond a reasonable doubt, that he is guilty of Involuntary Manslaughter, it will be your duty to convict him of that offense, and you will assess the maximum term of his confinment in the Penitentiary of the State at not more than a definite period of time, between one and five years, or it is within your power to commute his punishment from confinement

in the Penitentiary to imprisonment in the County Work House for any period, less than one year.

If you find the defendant Ware guilty at all, you must say in your verdict of what degree of felonious homicide he is guilty.

If, upon all the proof in the case, you have a reasonable doubt of the prisoner Ware's guilt of any of the offenses defined and explained to you, it is your duty to acquit the defendant, and your verdict will be, "Not Guilty."

You will then proceed to inquire whether or not the defendant E. E. Ashcraft is guilty as an Accessory Before the Fact to Murder in the First Degree. If you find him guilty of this offense beyond a reasonable doubt and to the exclusion of every other reasonable hypothesis than that of guilt, your verdict should be, "We, the Jury, find the defendant, E. E. Ashcraft, guilty as an Accessory Before the Fact to Murder in the First Degree as charged in the indictment and fix his punishment at Death by electrocution, unless you are of the opinion there were mitigating circumstances, in which event you may commute the punishment to imprisonment for life in the Penitentiary of the State for not more than a definite period of time between twenty years and a day and Life. If you find the defendant, E. E. Ashcraft, not guilty as an Accessory Before the Fact to Murder in the First Degree, or if you have a reasonable doubt of his guilt of that crime, or if your minds are not satisfied as to his guilt to the exclusion of every other reasonable hypothesis, you will acquit him of that offense [fol. 393] and proceed to inquire whether or not he is guilty as an Accessory Before the Fact to Murder in the Second Degree. If you find him guilty of that offense, beyond a reasonable doubt, your verdict should be, "We, the Jury, find the defendant, E. E. Ashcraft, guilty of Accessory Before the Fact to Murder in the Second Degree, as charged in the indictment, and assess the maximum period of his confinement in the Penitentiary at not more than a definite period of time between ten and twenty years. If, from all the proof in the case, you have a reasonable doubt as to his guilt, or if your minds are not satisfied as to his guilt to the exclusion of every other reasonable hypothesis, your verdict as to him will be, "We, the Jury, find the defendant E. E. Ashcraft not guilty."

Take the case, consider all the evidence fairly and im-

partially and return to the Court such verdict as truth dictates and justice demands.

(Signed) John W. Wilson, Judge.

Special Request for State

It is incumbent upon the State of Tennessee before you can convict either of the defendants to establish to your satisfaction under instructions already given:

As to the defendant Ware, that the defendant Ware killed Zelma Ida Asheraft and that the killing was done under such circumstances as would make him guilty under the law of some one of the grades of felonious homicide heretofore defined and explained to you.

As to the defendant, Asheraft, that the defendant Ware killed Zelma Ida Asheraft and that the killing was done in such a manner and by such means as to make the defend-
[fol. 394] ant Ware guilty under the law of either murder in the first degree or murder in the second degree as heretofore defined and explained to you and that the defendant Asheraft feloniously moved, incited, counseled, hired, commanded and procured the defendant Ware to kill her under such circumstances.

Given.

11-28-44. John W. Wilson.

Charge of Court in Response to Question from Jury as to Meaning of Mitigating Circumstances

In response to the question asked the Court charges you that mitigating circumstances is a matter left entirely to the sound discretion of the Jury.

(Signed) John W. Wilson, Judge.

[fol. 395] The jury thereupon, after deliberating, returned a verdict as follows:

Verdict as to Defendant Ware

We, the Jury, find the defendant Ware guilty of murder in the first degree as charged in the indictment, with mitigating circumstances and fixed punishment at life in the State Penitentiary.

VERDICT AS TO DEFENDANT ASHCRAFT

We, the Jury, find the defendant E. E. Ashcraft guilty as Accessory -for- The Fact to Murder in the First Degree as charged in the indictment, with mitigating circumstances and fixed punishment at life in the State Penitentiary.

Thereupon counsel for each defendant made an oral motion for a new trial and the same was set for hearing by the Court on December 7, 1944.

[fol. 396] At 2 p. m., on December 7th, 1944, this case came on further to be heard in this Court, on the written Motion of the defendants for a New Trial, heretofore filed within the time allowed by law, at which time the following proceedings were had:

Motions for New Trial Found on Pages 291-321. This Bill of Exceptions.

The Court: Are you gentlemen ready?

Gen. Gerber: Yes, sir.

Mr. Bickers: I have filed a Supplemental Motion here this morning in addition to the original motion heretofore filed.

The Court: I have not read the Supplemental Motion.

(Thereupon, Counsel for Defendant read his Supplemental Motion to the Court.)

Mr. Bickers: This is our Supplemental Motion for the defendant Ashcraft.

The Court: Mr. McCormick, did you file an amended motion?

Mr. McCormick: No, sir; I could not add anything to it.

Mr. Bickers: Does the court wish to hear argument?

The Court: I am here to listen to you gentlemen as long as you want to argue, it is up to you.

Mr. Bickers: I don't care to argue the motion.

Mr. McCormick: I don't care to add anything to what is in the motion.

The Court: General Gerber, is there anything from you?

Gen. Gerber: No, sir.

ORDER OVERRULING MOTIONS FOR NEW TRIAL

The Court: Gentlemen, the Court, after a careful consideration of all the evidence introduced, approves the verdict of the jury, and the Motion for a New Trial on behalf

of both defendants will be over-ruled. I take it that you gentlemen wish to note an exception.

Mr. Bickers: I note an exception.

Mr. McCormick: I note an exception.

[fol. 397] Mr. McCormick: And we make a Motion in Arrest of Judgment on the same grounds.

The Court: It is hereby over-ruled, and do you want to note an exception.

Mr. McCormick: Yes, sir. The proper exceptions have been noted. We have 30 days in which to file our Bill of Exceptions. That will take us up to January 6th or 7th. When does the term end?

Gen. Gerber: The third Monday.

Mr. McCormick: When can Court re-convene?

The Court: The 2nd of January.

Mr. McCormick: We have a right to perfect a Bill of Exceptions before the end of 30 days.

The Court: Let the defendant Ware stand up.

(The Court here sentences the defendant Ware.)

The Court: Stand up Ashcraft.

(The Court here sentences the defendant Ashcraft.)

The Court: Let the record show an exception to the Court's over-ruling the Motions for a New Trial and the sentencing of the defendants, and I take it you gentlemen wish to pray an appeal.

Counsel for Defendants: Yes, we do.

The Court: The Court will allow 30 days in which to file the Bill of Exceptions. I think that is ample time. After all there were quite a few witnesses introduced here but the testimony of some was very short, and I don't think you are going to have what you call an unusually large record and [fol. 398] in a very shor- time all the Courts will be adjourned for the Christmas Holidays and the reporter will have time during that time to prepare the record.

This was all the evidence introduced in the Trial.

This was all the proceedings had in the Trial.

[fol. 399] IN THE CRIMINAL COURT OF SHELBY COUNTY

[Title omitted]

MOTION FOR NEW TRIAL FILED FOR AND IN BEHALF OF DEFENDANT JOHN WARE

Comes the defendant, John Ware, and moves the court to grant him a new trial and to set aside the verdict of the jury and dismiss his case and enter a verdict of not guilty in his behalf, and in support of his motion sets forth the following grounds, to-wit:

I

The court erred in not granting a motion filed in behalf of defendant John Ware in this case prior to the entering into the trial of his case herein, which motion was filed in writing and formally made a part of this record, in which motion he prayed that upon the opinion and mandate of the Supreme Court of the United States and upon the opinion and procedendo of the Supreme Court of Tennessee, and upon the admissions, representations and recommendations of the attorneys representing the State of Tennessee, this Court, under proper procedure, have entered in his behalf a verdict of not guilty.

This motion was based upon the record and the proceedings had in all of the courts which was considered by the Supreme Court of the United States.

This defendant, Ware, stood convicted solely and alone upon evidence in the record secured by the officers and prosecuting authorities of Shelby County, Tennessee from him through coercive processes, threats and intimidation, and violence, and long quizzing. There was admittedly no other evidence in the record upon which a conviction of him could rest.

The Supreme Court of the United States considered his case along with that of his co-defendant, E. E. Ashcraft and on May 1, 1944, in an opinion, held all evidence against his [fol. 400] co-defendant Ashcraft inadmissible against him because said evidence consisting of statements and admissions made by him were not free and voluntary, but were secured through coercion and by illegal means and in violation of his constitutional rights.

The Supreme Court of the United States in said opinion vacated the judgment against him and remanded his case

to the Supreme Court of Tennessee for further proceedings. The Supreme Court of Tennessee, in its opinion, mandate and procedendo to this court, interpreted the opinion of the Supreme Court of the United States to hold that defendant Ware's so-called confession and the evidence presented by the officers in thie cause was also inadmissible as evidence because not freely and voluntarily given by Ware to the officers, and that it was secured through coercion, threats and violence and in violation of his constitutional rights.

The Supreme Court of Tennessee had this to say in its opinion on remand of this case:

> "A subsequent review of the convictions by the Supreme Court of the United States resulted in a reversal of the judgment of this Court, that court holding that the alleged confessions were illegally obtained and were not herefore admissible in evidence."

The evidence upon which both defendants were convicted was secured in one contin-ous endeavor by the officers and the attorney general's office of Shelby County, Tennessee, and in the same manner and through and by the same processes, the same officers, the same representative of the attorney general's office, consummated at the same time and taken by the same Notary, Waldauer, in the confession chamber on the fifth floor of the Shelby County jail on the early morning of Monday, June 16th, 1941.

The defendant says that it has been held by the Appellate Court that the evidence on which he stood convicted in the nature of admissions and confessions is inadmissible against him for any purpose because not freely and voluntarily given. This evidence as to him has been placed in the same category as that of his co-defendant Asheraft. [fol. 401] . He says that he is now being deprived of his liberty in violation of the Constitution of the United States and that his incarceration is illegal and in violation of due process of law.

The court further erred in not granting his said motion for the reason that the court stated, upon one or more occasions, that he was not familiar with the record of this case that went to the Supreme Court of the United States, did not know its contents, had not read it, he not having tried the case when the record was made, his Honor, Judge

Pleasants, having tried it, and yet over-ruled said motion without considering the grounds of his motion which were based entirely upon that record, considered by the Supreme Court of the United States, or familiarizing himself with said record.

It is submitted that the court erred in over-ruling his said motion without familiarizing himself with the record upon which it was based and the testimony therein contained. No new evidence was obtainable to the State of Tennessee and the State did not claim, through its representatives to have any other or new evidence against the defendant Ware. The court should further consider this defendant's motion, correct its obvious error, sustain his said motion and by proper legal process give him his liberty and see that he is no longer restrained of his liberty in violation of his constitutional rights and in violation of the opinion and holding of the Supreme of the United States and the opinion of the Supreme Court of Tennessee, on mandate and opinion of the Supreme Court of the United States and its interpretation thereof. The Supreme Court of Tennessee remanded this case to this Court for proceedings not inconsistent with the opinion of the Supreme Court of the United States and not for a new trial. Special reference is here made to this said written motion which was found to be formally a part of this record. It is submitted that this motion should be sustained.

II

Defendant John Ware moves the court further that he be granted a new trial in this case because there is no evidence [fol. 402] to support the verdict of the jury. There is no competent or credible evidence introduced against him in the record to support the verdict of the jury.

III

There is no evidence in the record competent or credible upon which the jury could find the defendant guilty to a moral certainty and beyond a reasonable doubt.

IV

The verdict of the jury is against the greater weight and preponderance of the evidence.

V

The verdict of the jury is contrary to the law and the evidence in the case.

VI

The competent and credible evidence in the case preponderates in favor of the innocence of the defendant rather than his guilt.

VII

The court erred in refusing to grant a motion made for and in behalf of the defendant Ware to take the case from the jury or direct a verdict of not guilty as to him, both at the conclusion of the State's proof and at the conclusion of all the proof introduced in the case.

This was error for the reason that there was no competent, credible evidence introduced in the record that even remotely connected the defendant Ware with the commission of the crime upon which he was being tried and stands convicted. He stands convicted solely and alone upon evidence by witness Becker and other witnesses for the State to the effect that he made certain admissions and confessions of his guilt. This evidence he says is incompetent and inadmissible for any purpose against him because not freely and voluntarily given, but given under threats and coercion. The competent, credible evidence in the record establishes the innocence of the defendant Ware and a verdict of not guilty should have been entered for him.

His said motion at the close of all the proof is in the following language:

[fol. 403] "Mr. McCormick: If your Honor please, at the close of all the proof, that being the state of the record, I want to renew the motions that I made at the close of the State's proof, enumerated in the record, as well as to renew my other motion made at the preliminary hearing in this case that we had across the street. The court recognizes the motion I am making and I believe at the beginning of the trial I incorporated those motions into this record formally.

The Court: It was a little later on in the trial, not in the beginning.

Mr. McCormick: And I want to move in addition to strike from this record any evidence or statements ap-

pearing in the record as coming from the defendant Ashcraft and tending to connect John Ware with this murder. The court sees what I am driving at there; any statements which might have been made either directly or indirectly as having come from Ashcraft would not be competent as against John Ware in this case. I made my objection at the time and I believe the court over-ruled me. I am quite sure you did, but I don't want to take any chances.

The Court: Didn't I instruct the jury that statements made by Ashcraft were not to be considered against the defendant Ware?

Mr. McCormick: I believe you did, but out of an abundance of caution I am incorporating this at the close of the proof.

Mr. Bickers: I understand your Honor in your charge will charge the jury the same thing.

General Gerber: We join in that request that the jury be so charged.

The Court: I over-rule Mr. McCormick's motion.

Mr. McCormick: Note my exception."

It was therefore error for the Court to over-rule his motion made in his behalf both at the close of the State's proof and at the close of all the proof, to enter a verdict of not guilty for him.

It is submitted that this court should correct this error and grant his motion.

VIII

The Court erred in allowing, over the objection and exception of the defendant Ware, witness Becker and other witnesses for the State to testify to the jury and give as evidence oral conversations and statements had with them in the confession chamber on the fifth floor of the Shelby County jail from 12:00 o'clock midnight, June 16th, 1941, until a written statement was secured from him between 6:00 and 7:00 o'clock on the same morning, having been taken by Notary Waldauer. This evidence, consisting of conversations and admissions, was secured illegally through means of coercion, abuse, violence, threats of mob violence

and fear for his life, and was inadmissible in evidence against him for any purpose because not freely and voluntarily made and was prejudicial to his rights in the trial of his case because, according to the witnesses, they were embodied in a written statement taken by Notary Wal- [fol. 404] dauer in consumation of the ordeal. He submits that it was error for the court to so allow this testimony to go to the jury and that the court should correct this error.

IX

The court erred in allowing the State of Tennessee, over the objection and exception of defendant War-, to introduce in evidence a certain written instrument purported to be evidence against him in the nature of a confession. It was error for the court to allow this evidence to be presented to the jury for its consideration against him for the reason that the said written instrument was secured from him through violence, threats, intimidation, fear, coercion, threats of mob violence, and was inherently coercive and in no sense free and voluntary, and, therefore, inadmissible against him for any purpose. It was further error so to do for the reason that the Supreme Court of Tennessee had in its opinion, interpreted the opinion of the Supreme Court of the United States to hold that the said evidence was illegal and inadmissible against him for any purpose and that he could not be convicted, there being no other evidence against him. This was held by the Supreme Court of the United States as an admission by the legal representatives of the State of Tennessee.

It was error for the further reason that he was in the "confession chamber" on the fifth floor of the Shelby County jail, tried by a quasi-judicial tribunal, consisting of the representatives of the sheriff's office of Shelby County, Tennessee and the representatives of the attorney general's office, and convicted making the trial in this case, before a jury of his peers, a mere formality.

It was error further for the reason that he was held at the time of the taking of said statement in the "confession chamber" incommunicado without the aid of counsel or friends, an ignorant, 19-year-old negro boy, subjected to persistent and protracted questioning, threatened with mob violence, in mortal fear of his life, and the statement given under these circumstances was not free and voluntary, and, therefore, inadmissible in evidence against him.

It was eror further because as aforesaid he was deprived of the right of counsel and held incommunicado, when [fol. 405] there is a public defender in Shelby County, a paid lawyer, subject to call by the representatives of the State, to be present to advise with him and protect his constitutional rights in this matter. He was deprived even of the services of said public defender who was elected as a public officer to protect his rights and the rights of the community generally in such matters. It is submitted that the court erred in allowing any of this evidence in the nature of oral conversations or admissions, and the written instrument, to be submitted to the jury for its consideration against him in this case, same being inadmissible. It is submitted that this was error and that the court should grant the defendant's prayer for a new trial.

X

The Court erred in refusing counsel for the defendant Ware in this case the right to argue both the law and the facts as set out in the opinion of the Supreme Court of the United States in this case, it being a part of the case, and the law and facts in the opinion of other courts in like cases, to the jury.

There was no new evidence introduced in this case. The same witnesses testified that testified in the case considered by the Supreme Court of the United States. No new witness testified. The evidence introduced in this case consists of a reproduction and rehashing of the evidence of the same witnesses that testified in the case considered by the Supreme Court of the United States. The facts discussed by the Supreme Court of the United States in its opinion are the same facts embodied now in this record, made upon this trial.

It is submitted that it is the constitutional right of the defendant Ware to have had his case fully argued and presented through his counsel within legal limits to the best of his ability. This was refused by the Court as is reflected by record made and set forth as follows:

> [fol. 406] "General Gerber: If your Honor please, in the absence of the jury, for the purpose of expediting the argument, and feeling that we did not want to interrupt counsel in their argument, we have had a conference with them in reference to the admissibility

of certain parts of the opinion of the Supreme Court of the United States. We take the position that it is improper to read any facts in any of the opinions of the Supreme Court to the jury in argument. We have no objection to reading any law that counsel wants to read to the jury, but under the law they do not have a right to get up here before this jury and tell this jury what Hugo Black said to Nat Tipton and what Nat Tipton said to Hugo Black about this case; and I want to submit to your Honor the case of Smithson vs. State, reported in 127 Tennessee at page 359, which I think is on all fours with this case.

> "This case is before this court a second time, on a conviction at a third trial for the crime of manslaughter and assessment of punishment at two years in the penitentiary.
>
> The opinion of this court on the formal appeal is reported in 124 Tenn. 218. * * * On the trial of the court below, counsel for State,"—we are doing the same thing in this case—"in advance of the production of any evidence, asked that the jury be caused to retire, in order to a submission to the trial judge of a motion. In the absence of the jury, Counsels for the State stated that they had been informed that counsel for defendant purposed reading to the jury in the argument of the case this court's opinion so reported, that the prosecution objected to such reading, and it was moved that the court rule in advance respecting same. The court stated that such reading would be improper, since the court in that opinion commented on the facts relating to the motives of the deceased and of plaintiff in error, as disclosed on such former trial, but stated that he would rule on the question if and when the defendant's counsel offered to read the opinion, which they had just asserted their intention to do. Thereafter, there was no such offer or effort made. For this reason there is no error, under the assignment.
>
> But, on broader grounds, the ruling of the trial Judge was not erroneous, in that it was within his sound discretion to deny the reading of the opin-

ion so treating of facts and motives; and we think his indicated ruling would have been far from being improper."

[fol. 407] And so we say, if your Honor please, in a case of this kind counsels have no right to read any facts from any opinion in this case. And we offer this Smithson case, which is the last in Tennessee on our proposition. We do not want to be placed in the position of objecting while counsel are arguing or to do anything that would interfere with the argument of counsel, and possibly distract them from their argument, and we say that what Nat Tipton said to Hugo Black, or what Hugo Black said to Nat Tipton cannot be related to this jury by the reading of that opinion.

The Court: Let me see that book.

(Court examines 127 Tennessee.)

The Court: What do you say to that, Mr. Bickers and Mr. McCormick?

Mr. Bickers: Nothing at this time.

Mr. McCormick: I don't intend to refer, so far as this opinion is concerned, to any of the facts set out in this opinion with reference to the alleged confession of Ashcraft; but I do intend, and I most earnestly insist to the court that I have a right to read the conclusions of law and part of what the Supreme Court has sais further in this opinion.

The Court: Let me understand you gentlemen. General Gerber, Mr. McCormick states that he does not intend to do anything that you anticipate.

General Gerber: We say it is improper for these lawyers to argue what Hugo Black said to Nat Tipton, or to discuss any facts. Any conclusions of law are competent.

Mr. McCormick: Mr. Gerber is using Justice Hugo Black. Justice Black simply wrote the opinion.

General Gerber: Anything he says on the law is competent.

Mr. McCormick: He says plenty and it applies right to this lawsuit—part of it—right here. It is part of this case, [fol. 408] facts and all, and I think it would be error for the court to hold that we are limited to reading certain portions of this opinion, because I think we have a right to read every word of it, because it is a part of this case, a part of this record. We have the same witnesses; there wasn't a

new witness put on the stand, not a one. We have the same facts involved here and they are trying to convict on the same facts with reference to both defendants. There is no controverting that statement, and I want to say to this Court that these men have a right to be heard, and that is their constitutional rights; and there are few limitations put on a man's constitutional rights when his life is at stake. It is perfectly ridiculous to say that while over here in the Circuit Courts, with nothing but property rights involved, a lawyer can pick up books containing cases from all over the United States and read the facts and conclusions of law that are drawn from those facts, the lawyers for these men would be barred from reading this opinion which is a part of this very case.

General Gerber: In this opinion by Mr. Justice Black, he made use of this language: "Upon oral argument before this Court Tennessee's legal representatives conceded that the convictions could not be sustained without the confessions but defended their use upon the ground that they were not compelled but were 'freely and voluntarily made.'"

We say it would be improper to read that statement to this jury, and every other fact statement is improper and incompetent to be read to this jury, and we say that on the authority which we have read to your Honor. We agree that they have a right to read the law but they have no right to read the facts out of the opinion.

The Court: I thought you gentlemen were in accord when we started here. Now, Mr. McCormick, I don't agree with the statement you made that in the Circuit Court we follow the rule that you can discuss facts stated by the Supreme Court of the State in some other lawsuit. That is not the [fol. 409] practice. It is limited to a discussion of the law.

In this case, it is the opinion of the Court that it would be improper to make any mention of the facts referred to by the Supreme Court in the opinion which has been mentioned.

I have heard Ashcraft's confession mentioned, but I don't know what Ashcraft's confession was. We have kept it out. It is the ruling of this court that it will be improper to discuss or make reference to any facts referred to by the Supreme Court in the opinion referred to and I want you

gentlemen to respect that finding. You can note your exception, Mr. McCormick.

Mr. McCormick: Note my exception.

Mr. Bickers: Note my exception.

The Court: Very well. Note an exception for Mr. McCormick and Mr. Bickers."

It is submitted that the court erred in limiting counsel for the defendant War- in so arguing and presenting his case to the jury, and particularly with respect to the opinion of the Supreme Court of the United States, when the facts and evidence presented in this case by the State is the same evidence that was presented for all practical purposed in the former case considered by the Supreme Court of the United States.

Therefore, defendant Ware says that he should be granted a new trial for this error on the part of the Court.

For all of the above assigned reasons and grounds, defendant Ware prays that he be granted a new trial to the end; that complete justice be meted out to him and his liberty restored to him in accordance with his legal and constitutional rights.

Respectfully submitted, Grover McCormick, Counsel for Defendant, John Ware.

[fol. 410] In the Criminal Court of Shelby County

[Title omitted]

Motion for New Trial Filed for and in Behalf of Defendant E. E. Ashcraft

Comes now the defendant, E. E. Ashcraft, and moves the Court to set aside the verdict of the jury herein made and entered against him and grant him a new trial and dismiss his case and enter a verdict of not guilty for and in his behalf, and in support of his motion sets forth the following grounds, to-wit:

I

The court erred in not granting a motion filed in behalf of the defendant E. E. Ashcraft in the case prior to the entering into the trial of his cause herein, which motion

was filed in writing and formally made a part of this record, in which motion he prayed that upon the opinion and mandate of the Supreme Court of the United States and upon the opinion and procedendo of the Supreme Court of Tennessee and upon the admissions and representations of the attorneys representing the State of Tennessee, this court, under proper procedure, have entered in his behalf a verdict of not guilty.

This motion was made upon the record and the proceedings had in all of the Courts, which was considered by the Supreme Court of the United States.

This defendant Asheraft stood convicted solely and alone upon evidence in the record secured by the officers and prosecuting authorities of Shelby County, Tennessee, from him through coercive process, threats and intimidation, and long quizzing. There was admittedly no other evidence in the record upon which a conviction could rest.

[fol. 411] The Supreme Court of the United States held inadmissible all of this evidence and stated in its opinion that the representatives of the State of Tennessee conceded that there was no other evidence in record upon which a conviction could rest. In this situation, there was no evidence in the record to put the defendant Asheraft to trial upon, and this motion should have been by the Court granted and the defendant Ashgraft given his liberty, and not to do so violated his constitutional right under the Constitution of the United States and the Constitution and decisions of the State of Tennessee, and the defendant Asheraft is held restrained of his liberty and incarcerated without due process of law.

The court further erred in not granting the said motion of the defendant E. E. Asheraft for reason that the court stated, upon one or more occasions, that he was not familiar with the record of this case that went to the Supreme Court of the United States, did not know its contents, had not read it, he not having tried the case when the record was made, his Honor, Judge Pleasants, having tried it, and yet overruled said motion of defendant E. E. Asheraft without considering the grounds of his motion, which were based entirely upon that record, or familiarizing himself with said record.

It is submitted that the court erred in overruling the said motion without familiarizing himself with the record upon

which it was based and the testimony therein contained. That his motion, in legal effect, stands unadjudicated. No new evidence was obtainable to the State and the State did not claim, through its representatives, to have any other or new evidence against the defendant Ashcraft. The court should further consider this defendant's motion, correct its obvious error, sustain the said motion, and by proper legal process give him his liberty and see that he be no longer restrained of his liberty in violation of his constitutional right and in violation of the opinion and holding of the Supreme Court of the United States and its plain and positive mandate. Special reference is here made to said written motion found in this record.

[fol. 412] II

The court erred in this case in not sustaining a written motion made by and in behalf of the defendant Ashcraft for a severance.

Special reference is made to this written motion, which is a part of the record in this case.

It was stated to the court that it would be highly prejudicial to the rights of this defendant to be forced to a trial with his codefendant, Ware; that their defenses were antagonistic and that it would be impossible to secure a fair and impartial trial if tried jointly with him.

The court abused his discretion in forcing him to trial with his co-defendant Ware and his rights were in fact, in the trial of this case, irretrievably and incurably prejudiced, for the reason that both the alleged and written evidence in the nature of what was designated a confession alleged to have been made by Ware, was allowed to be erroneously presented to the jury for its consideration. This testimony, allowed erroneously by the court to go to the jury, was of such a nature, and so highly prejudicial to the rights of the defendant Ashcraft, that no instruction by the Court to the jury not to consider it against Ashcraft could remove this stigma of prejudice, and its deadly effect upon the fair consideration of the case by the jury trying him. The jury could not fairly try his case after hearing this evidence.

It was error for the court not to grant his motion for a severance and the court abused its discretion in so over-

ruling same. It is submitted that this court should set aside the verdict of the jury against him in this case, grant his motion for a severance to the end that full and complete justice be meted out to him.

III

In this case, the defendant Asheraft says that the verdict of jury against him herein should be set aside and for naught held for the reason that there is no competent or credible evidence in the record to support the verdict of the jury.

[fol. 413]

IV

There is no evidence in the record from which the jury could find the defendant guilty to a moral certainty and beyond a reasonable doubt.

V

The verdict of the jury is against the greater weight and preponderance of the evidence.

VI

The verdict of the jury is contrary to the law and the evidence in the case.

VII

The evidence in the case preponderates in favor of the innocence of the defendant rather than his guilt.

VIII

The court erred in refusing to grant a motion made for and in behalf of the defendant Asheraft to take the case from the jury or direct a verdict of not guilty as to him, both at the conclusion of the State's proof and at the conclusion of all the proof introduced in the case.

This was error for the reason that there was no competent, credible evidence introduced in the record that even remotely connected the defendant Asheraft with the commission of the crime upon which he was being tried. The competent, credible evidence in the record establishes the innocence of the defendant Asheraft, and a verdict of not guilty should have been *tenered* for him.

It was therefore error for the court to overrule his motion made in his behalf both at the close of the State's proof and at the close of all the proof, to enter a verdict of not guilty for him.

It is now submitted that this court should correct this error and grant his motion.

IX

The court erred in allowing the State, over the objection and exception of the defendant Asheraft, to introduce in evidence, for the consideration of the jury as evidence against him, through witness Becker, and other State wit-
[fol. 414] nesses, conversations, admissions, quizzings, facts and circumstances relative to the killing of his wife, transpiring and taken from him within what the Supreme Court of the United States, in its opinion, referred to and designated as a "confession chamber"—the homicide room —on the fifth floor of the Shelby County jail. All this evidence is set forth in the record.

This was error for the reason that the Supreme Court of the United States, in its opinion in this case, held it inadmissible for any purpose against the defendant Asheraft and declared it to be the result of force, coercion, threats and not free and voluntary, and the product of thirty-six hours of coercive efforts on the part of and officers and the prosecuting attorney's office.

Witness Becker and other officers and a representative of the attorney general's office were, over the objection and exception of the defendant, allowed to relate and present as evidence to the jury practically everything that transpired and took place in the confession chamber during the thirty-six hour ordeal, both that taken down in writing by the notary, Waldauer, and that orally given in the chamber, save and except the statement that Asheraft admitted hiring defendant Ware to take his wife's life. All the evidence that was given at the last trial of this case and which was considered by the Supreme Court of the United States, and which was ruled incompetent by it, was allowed to go to the jury in this case, save, as aforesaid, the statement alleged to have been made by Asheraft that he hired John Ware to take his wife's life. We submit this was error—fatal error. It is submitted that there is no new evidence introduced by the State in this case from that

introduced in the former case. There was no new evidence, there was not a new witness, the witnesses were all the same. The evidence in this case consists of a rehashing of the testimony of the same witnesses that appeared at the former hearing of the case and considered by the Supreme Court of the United States.

All of the evidence was considered by the Supreme Court of the United States and ruled incompetent because not freely and voluntarily given. In this case, a portion of [fol. 415] it was allowed to be given to the jury on the ground that it was circumstantial evidence and not direct or substantive evidence. It is submitted that circumstantial evidence secured through coercion, threats of violence and in violation of the defendant's constitutional right, not free and voluntary, is incompetent and inadmissible, just as substantive evidence or direct evidence so secured is inadmissible. As a fact, this is the holding of the Supreme Court of the United States in this case. It is submitted that this defendant Asheraft stands convicted in this case solely and alone upon this incompetent and inadmissible testimony, secured from him by coercion in the so-called confession chamber on the fifth floor of the Shelby County jail, where he was held alone and helpless incommunicado, without the aid of counsel or friends, and quizzed in relays for approximately thirty-six hours without rest or sleep.

If the sheriff's office and the office of the prosecuting attorney of Shelby County had desired to take from defendant Asheraft a statement that would be legal and admissible as evidence, they could have called the public defender of Shelby County, Tennessee, a lawyer of ability, a paid, public official of Shelby County, Tennessee, whose office was created by the Legislature of State of Tennessee, for the purpose of protecting the rights of persons suspected of crime and being interviewed and questioned, as was Asheraft on this occasion during this period of thirty-six hours of confinement.

The Notary, Waldauer, was called out of his bed at an early morning hour, to come down and take Asheraft's statement. The Public Defender was available and could have been called and his services secured at the time defendant Asheraft was first taken into custody and also called at the time Notary Waldauer was called. Defendant Asheraft's constitutional rights were violated from the time he was taken into custody until the ordeal was completed

the following Monday morning, and as stated upon a former occasion, was to all intents and purposes tried and convicted by a quasi-judicial tribunal consisting of the officers and the attorney general's office of Shelby County, Tennessee, in the confession chamber on the fifth floor of the [fol. 416] Shelby County jail. It is submitted that any and all evidence, statements of any kind or character, made by defendant Ashcraft, is inadmissible against him for any purpose, and this court erred in allowing any of this testimony to go to the jury in this case for its consideration against him.

It is submitted that for this error, the court should grant the defendant Ashcraft a new trial.

X

The Court erred in refusing counsel for the defendant Ashcraft in this case the right to argue both the law and the facts as set out in the opinion of the Supreme Court of the United States in this case, it being a part of the case, and the law and facts in opinions of other courts in cases of like character, to the jury. It is submitted that it is the constitutional right of the defendant Ashcraft to have had his case fully argued and presented through his counsel within legal limits to the best of his ability. This was refused by the — as is reflected by the record as made, set forth as follows:

[fol. 417] General Gerber: If your Honor please, in the absence of the jury, for the purpose of expediting the argument, and feeling that we did not want to interrupt counsel in their argument, we have had a conference with them in reference to the admissibility of certain parts of the opinion of the Supreme Court of the United States. We take the position that it is improper to read any facts in any of the opinions of the Supreme Court to the jury in argument. We have no objection to reading any law that counsel wants to read to the jury, but under the law they do not have a right to get up here before this jury and tell this jury what Hugo Black said to Nat Tipton and what Nat Tipton said to Hugo Black about this case; and I want to submit to your Honor the case of Smithson vs. State, reported in 127 Tennessee at page 359, which I think is on all fours with this case.

"This case is before this court a second time, on a conviction at a third trial for the crime of manslaughter and assessment of punishment at two years in the penitentiary.

The opinion of this court on the formal appeal is reported in 124 Tenn. 218. * * * On the trial of the court below, counsel for State,"—we are doing the same thing in this case—"in advance of the production of any evidence, asked that the jury be caused to retire, in order to a submission to the trial judge of a motion. In the absence of the jury, counsel for the State stated that they had been informed that counsel for the defendant purposed reading to the jury in the argument of the case this court's opinion so reported, that the prosecution objected to such reading, and it was moved that the court rule in advance respecting same. The court stated that such reading would be improper, since the court in that opinion commented on the facts relating to the motives of the deceased and of plaintiff in error, as disclosed on such former trial, but stated that he would rule on the question if and when the defendant's counsel offered to read the opinion, which they had just asserted their intention to do. Thereafter, there was no such offer or effort made. For this reason there is no error, under the assignment.

But, on broader grounds, the ruling of the trial Judge was not erroneous, in that it was within his sound discretion to deny the reading of the opinion so treating of facts and motives; and we think his indicated ruling would have been far from being improper."

And so we say, if your Honor please, in a case of this kind counsels have no right to read any facts from any opinion in this case. And we offer this Smithson case, which is the last in Tennessee, on our proposition. We do not [fol. 418] want to be placed in the position of objection while counsel are arguing or to do anything that would interfere with the argument of counsel, and possibly distract them from their argument, and we say that what Nat Tipton said to Hugo Black or what Hugo Black said to Nat Tipton cannot be related to this jury by the reading of that opinion.

The Court: Let me see that book.

(Court examines 127 Tennessee.)

The Court: What do you say to that, Mr. Bickers and Mr. McCormick?

Mr. Bickers: Nothing at this time.

Mr. McCormick: I don't intend to refer, so far as this opinion is concerned, to any of the facts set out in this opinion with reference to the alleged confession of Ashcraft; but I do intend, and I most earnestly insist to the court that I have a right to read the conclusions of law and part of what the Supreme Court has said further in this opinion.

The Court: Let me understand you gentlemen. General Gerber, Mr. McCormick states that he does not intend to do anything that you anticipate.

General Gerber: We say it is improper for these lawyers to argue what Hugo Black said to Nat Tipton or to discuss any facts. Any conclusions of law are competent.

Mr. McCormick: Mr. Gerber is using Justice Hugo Black. Justice Black simply wrote the opinion.

General Gerber: Anything he says on the law is competent.

Mr. McCormick: He says plenty and it applies right to this case, because I say to the Court right now that this is our lawsuit—Part of it—right here. It is part of this case, facts and all, and I think it would be error for the court to hold that we are limited to reading certain portions of this opinion, because it is a part of this case, a part of this record. We have the same witnesses; there [fol. 419] wasn't a new witness put on the stand, not a one. We have the same facts involved here and they are trying to convict on the same facts with reference to both defendants. There is no controverting that statement, and I want to say to this Court that these men have a right to be heard, and that is their constitutional rights; and there are few limitatios put on a man's constitutional rights when his life is at stake. It is perfectly ridiculous to say that while over here in the Circuit Court, with nothing but property rights involved, a lawyer can pick up books containing cases from all over the United States and read the facts and conclusions of law that are drawn from those facts, the lawyers for these men would be barred from reading this opinion which is a part of this very case.

General Gerber: In this opinion by Mr. Justice Black, he made use of this language: "Upon oral argument before this Court Tennessee's legal representatives conceded that the convictions could not be sustained without the con-

fessions but defended their use upon the ground that they were not compelled but were 'freely and voluntarily made.'"

We say it would be improper to read that statement to this jury, and every other fact statement is improper and incompetent to be read to this jury, and we say that on the authority which we have read to your Honor. We agree that they have a right to read the law but they have no right to read the facts out of the opinion.

The Court: I thought you gentlemen were in accord when we started here. Now, Mr. McCormick, I don't agree with the statement you made that in the Circuit Court we follow the rule that you can discuss facts stated by the Supreme Court of the State in some other lawsuit. That is not the practice. It is limited to a discussion of the law.

In this case, it is the opinion of the Court that it would be improper to make any mention of the facts referred to [fol. 420] by the Supreme Court in the opinion which has been mentioned.

I have heard Asheraft's confession mentioned, but I don't know what Asheraft's confession was. We have kept it out. It is the ruling of this court that it will be improper to discuss or make reference to any facts referred to by the Supreme Court in the opinion referred to and I want you gentlemen to respect that finding. You can note your exception, Mr. McCormick.

Mr. McCormick: Note my exception.

Mr. Bickers: Note my exception.

The Court: Very well. Note an exception for Mr. McCormick and Mr. Bickers.

It is submitted that the court erred in limiting counsel for the defendant Asheraft in so arguing and presenting his case to the jury, and particularly with respect to the opinion of the Supreme Court of the United States, when the facts and evidence presented in this case by the State is the same evidence that was presented for all practical purposes in the former case considered by the Supreme Court of the United States.

Therefore, defendant Asheraft says that he should be granted a new trial for this error on the part of the Court.

For all of the above assigned reasons and grounds, defendant Asheraft prays that he be granted a new trial to the end that complete justice be meted out to him and his

liberty restored to him in accordance with his legal and constitutional rights.

Respectfully submitted, James L. Bicker, Counsel for Defendant E. E. Asheraft.

[fol. 421] In the Criminal Court of Shelby County

[Title omitted]

Amended and Supplemental Motion for a New Trial, Filed in Behalf of E. E. Ashcraft in This Case

Comes now defendant, E. E. Asheraft and moves the court to set aside the verdict herein, made and entered against him, and grant him a new trial and dismiss his case or enter a verdict of not guilty in his behalf, and in support of his motion sets forth an additional ground as follows:

The court erred in not granting the motion filed in behalf of E. E. Asheraft, prior to the entering into the trial of his case, herein, which motion was filed in writing and formerly made a part of this record, in which motion he prayed that upon the opinion and mandate of the Supreme Court of the United States and upon the opinion and prosodendo of the Supreme Court of the State of Tennessee, and upon the admissions and representations of the representatives of the State of Tennessee, this court, under proper procedure, have entered a verdict of not guilty in his behalf, and not put him upon trial, alleging that to do so would be by the court to put him twice in jeopardy.

[fol. 422] This was error not to grand his said motion for the reason that for this court to put him to trial would be inconsistent with the opinion of the Supreme Court of the United States, and contrary to the positive mandate of said Court.

The Supreme Court of the United States found in its opinion, upon the consessions and admissions of the representatives of the State of Tennessee, that there were no competent evidence in the record upon which to convict defendant, E. E. Asheraft.

The incompetent evidence was ruled out by the Supreme Court of the United States, and there was no evidence left

upon which to convict. The case was reversed by the Supreme Court of the United States, with a positive mandate not to re-try defendant Ashcraft, but for proceedings not inconsistent with its opinion and said mandate.

For this court to proceed other than to dismiss or order a verdict of not guilty, would be inconsistent with the opinion and mandate of the Supreme Court of the United States. To put him to trial was to twice put him in jeopardy, and against his constitutional and legal rights.

The opinion of the Supreme Court of the United States and its mandate thereon, constituted a final determination of his rights in this case.

To put him to trial was illegal, oppres-ive and as aforesaid, in violation of his constitutional rights, both under the Constitution of the United States and the Constitution of the State of Tennessee and the laws of said State, and in violation of the opinion and positive mandate of the Supreme Court of the United States.

[fol. 423] The Court erred further in not granting his said motion for the reason that the court stated that he was not familiar with the record of this case that went to the Supreme Court of the United States, and did not know its contents; had not read it and yet overruled his said motion, without familiarizing himself with this record, when the motion is based entirely upon it.

Although the court did know and was familiar with the record of the first trial of this case where the proof against the defendant was fully and completely developed, and all of this erroneous evidence incorporated therein, because as a special judge elected by members of the bar of Shelby County, after the death of Judge Wallace, who tried it, this court certified the bill of exceptions of the first trial, and on examination, found it in all things correct.

He, therefore, says the court erred in not sustaining his motion for a new trial on this ground and that the court should correct its error, dismiss his case, or order a verdict of not guilty in his behalf.

He is being restrained of his liberty without due process of law and in violation of his constitutional rights.

James L. Bicker, Attorney for E. E. Ashcraft.

[fol. 424] The defendants in this case, in due time, and within the time provided by law and the rules of the Court, filed their written motions for a new trial, including an amended motion for a new trial, filed on the behalf of de-

fendant E. E. Asheraft, which motions are physically attached to this record.

And after argument of counsel and due consideration by the Court, it was the opinion of the Court that said motions for a new trial should be overruled, and it was so ordered, adjudged and decreed by the court that said motions for a new trial be overruled.

The defendants, each of them excepted to the action of the Court in overruling their motions for a new trial, prayed an appeal to the Supreme Court of Tennessee, which prayer for an appeal was granted by the Court.

Thereupon, counsel for the defendants herein, for and in their behalf, presented to the Court a Bill of Exceptions, consisting of all of the evidence in the case, and all of the exhibits presented at the hearing of the cause, the charge of the Court, the defendants motions for a new trial, and defendant Asheraft's amended motion for a new trial and their motions in arrest of judgment, and all of the written motions made by the defendants, prior to the going into the actual trial of this case, including all proceedings had in the case, and the Court after a full examination of said Bill of Exceptions, found it in all things correct and proper, and after having signed and authenticated and sealed same, and authenicated all exhibits, orders same to be made a part of the record.

ORDER SETTLING BILL OF EXCEPTIONS

The said Bill of Exceptions having been filed within the time provided by law and the rules of the Court, the Court finding it as aforesaid, correct and proper, orders same to be filed and made a part of the record in this case.

This 13th day of January, 1945.

John W. Wilson, Judge of Division Two of Circuit Court of Shelby County, Tennessee Sitting by Interchange for Judge R. G. Kinkle, of Division One of Criminal Court of Shelby County, Tennessee.

[File endorsement omitted.]

O. K. for the State of Tennessee. Chas, O. Rond, Ass't Dist. Atty. Gen.

O. K. Grover N. McCormick, Atty. for Defendant Ware.
1/4/45.
O. K. Ashcraft. Jas. L. Bicker.

[fol. 425] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 426] IN SUPREME COURT OF TENNESSEE

Shelby Criminal

E. E. ASHCRAFT AND JOHN WARE

v.

THE STATE

OPINION—June 9, 1945

The plaintiffs in error, hereinafter referred to as defendants, were jointly indicted in the Criminal Court of Shelby County for the murder of Mrs. Zelma I. Ashcraft. The indictment charged Ware with murder in the first degree and Ashcraft as being an accessory before the fact to said homicide. The defendants were later tried and convicted as charged, the jury fixing their punishment at life imprisonment in the state penitentiary. This is the third appeal from convictions for their said offense. The last appeal which was affirmed by this Court was appealed to the Supreme Court of the United States where it was reversed for error in ruling as competent the confession of Ashcraft to his participation in the crime. The case was remanded to this Court for further proceeding not inconsistent with the opinion and was later remanded to the Criminal Court of Shelby County.

[fol. 427] Before considering errors alleged to have been committed on the trial of the case, we will consider the contention made on behalf of Ashcraft that the trial judge was in error in not sustaining his motion to dismiss the case as to him. This insistence is based upon the statement made in the majority opinion of the Supreme Court of the United States to the effect that it was conceded that apart from Ashcraft's confession there was not sufficient evidence to justify a verdict of guilt, or that there was no other evidence left upon which a conviction can be based. Responding to this contention, we find nothing in the record

indicating a peremptory order by the Supreme Court of the United States. That Court held the written confession inadmissible because it had been obtained by coercion. The case was remanded for further proceedings. When the procedendo reached this Court a memorandum opinion was filed directing a further remand to the trial court. We did not indicate that the case should be dismissed as to either of the defendants, but remanded for further proceedings not inconsistent with the opinion.

When the case was being argued in the Supreme Court of the United States, Mr. Justice Black asked General Tipton, "If we eliminate the confessions from the record, is there any evidence left upon which to convict these defendants or to connect them with the crime?" General Tipton: "I will answer you this way. If this case of these defendants is reversed, it will of necessity go back to Shelby [fol. 428] County, Tennessee, there to be dealt with by the Attorney General of that county as he might see fit, and I do not want to be placed in the position of in any way binding him." It is true he later told the Court that aside from the confessions there was no other evidence to convict them of crime. When the procedendo came to this Court there was a strong objection by the District Attorney General to any order directing a dismissal of the case. It was his insistence that he had sufficient evidence to convict independent of Ashcraft's confession. It was after this objection was made that this Court remanded the case for further proceedings. We are therefore of opinion that the trial judge was not in error in refusing to dismiss the case and release defendants from custody.

We will now proceed to consider errors claimed to have been committed on the trial of the case. A number of errors are assigned on behalf of both defendants, jointly and separately. They involve two determinative questions: (1) that the evidence preponderates in favor of their innocence and against their guilt, that there is no competent evidence in the record to justify a conviction; and (2) that the trial judge was in error in admitting Ware's written confession, because it was obtained by coercion, and that he was in error in admitting a statement or declaration by Ashcraft which involved Ware in the crime, although the written confession of Ashcraft was excluded. It is here insisted [fol. 429] that the trial judge admitted the written confes-

sion of Ware in direct contravention of the ruling of the Supreme Court of the United States; and that his admission of oral statement by Asheraft was contrary to the ruling of that Court. Counsel here contend that these alleged errors were prejudicial to the rights of both defendants under the due process clause of the Constitution of the United States.

On June 5, 1941, about four o'clock in the afternoon the dead body of Mrs. Zelma Asheraft was found floating in a bayou which was a little west of the highway leading from Memphis toward the village of Raleigh. She was fully dressed. When her body was taken from the water it was discovered that she had four deep wounds in the top of her head which were sufficient to cause her death. There was no evidence of a struggle and none pointing to robbery as a motive for the crime. Her automobile was standing near where her body was found. It had been seen at this same place from about 2:30 or three o'clock on the morning of the 5th until late in the afternoon, and was facing toward Raleigh on the left side of the highway. The body was identified by her driver's license.

Immediately following the discovery the body of the deceased was taken to a mortuary and the defendant notified. He identified it as that of his wife. According to Police officers he showed no emotion whatever, nor did he make any inquiry as to how or where she met her death. [fol. 430] The deceased had planned to make a visit to her mother in Kentucky, leaving Memphis on the early morning of June 5, 1941, by automobile. On the night before she was to leave there were four student nurses visiting in the home, also Cora Taylor, a negro maid. These persons and a neighbor were the only ones besides her husband who knew of this contemplated visit. The officers, in an effort to discover the murderer, quizzed all of these persons and learned that the defendant was the only one who had seen her leave the home. In all cases of this character the husband becomes a suspect, especially if there is a motive for the homicide and where, as in the instant case, he is the last to be seen with her alive. On the night before Mrs. Asheraft was to leave there appeared to be perfect harmony in the home. By the process of elimination all persons who might be suspected were eliminated except the defendant. The next question for their deci-

sion was a motive for the killing. From the evidence before us there was no attempt at robbery, although the killer had tried to make it appear that she had been robbed. The contents of her pocket book were scattered on the ground near the car. A rosary and her bank books were found near the automobile. Nothing of any value however had been taken and her suitcase on the back seat of the car had not even been opened. She was not killed out of revenge or ill will because she had no enemies. The State contends that the defendant Asheraft had two motives for killing his wife. First, Mrs. Asheraft had been operated on by. [fol. 431] removing her Fallopian tubes and a portion of her ovaries, which made her very nervous. At times she almost became hysterical. She was in the habit of taking amytal tablets, which is a strong sedative. As a result of the operation there is some evidence to the effect that she was not able to consummate the marital relation. Second, the deceased and her husband had accumulated some property. There was an insurance policy on her life of one thousand dollars, payable to defendant, which contained a double indemnity provision in case of accidental death. The record shows they had approximately $3600.00 in savings and commercial accounts in a Memphis bank. These were joint accounts and upon Mrs. Asheraft's death the defendant would acquire the entire amount.

When Asheraft was first informed of his wife's tragic death he inquired at once if she had been robbed and stated that when she left home she had fifty dollars in her purse and two hundred dollars in a chamois bag pinned underneath an inner garment. When her clothing was examined there was no evidence of or sign of any pin holes where such a bag could have been attached. According to the testimony of those present when Asheraft was brought in to identify the body, he showed no emotion; he merely placed his hand upon her lifeless body and said "she had been a good girl."

[fol. 432] In justice to the defendant it should be stated that he was an industrious man and otherwise had a good reputation. Within a few days following the crime Ashcraft was taken to the police station and questioned. He appeared to be cooperative. He was not taken into custody until Saturday afternoon, June 14th, about 7:30 o'clock. At that time he was taken to the fifth floor of the jail and

was questioned by various officers in relays until the following Sunday night. During this entire time he denied having any connection with the crime. He contended that on the morning his wife left home they had arisen about three o'clock in the morning. He backed the car out of the garage and deceased got in it; that the car was slow to warm up, due to a leak in the hose connection; that she sat in the car until a miss in the engine stopped and she then drove away. The defendant then went back to bed and arose early the next morning and, after preparing his breakfast, went to work. About eleven o'clock on Saturday night, after being questioned, he made the statement that circumstances pointed toward him, but continued to deny his guilt. The investigation continued until eleven o'clock Sunday night when defendant stated that "a negro had killed his wife—a negro by the name of John or Tom Ware." This was the first information that the officers had about Ware. It appears that Asheraft could not tell them where Ware lived, but could show them. They thereupon went to the home of Ware, accompanied by Asheraft, leaving the jail about midnight. The first house they visited was not [fol. 433] Ware's home, but they found him next door. The officers did not tell Ware why he was arrested. On their way back to the jail Asheraft and Ware had no conversation. The party reached the jail about one o'clock, A. M. The officers testified that upon reaching the jail Asheraft was confronted with Ware and the latter was asked whether or not he knew Asheraft. He replied that he did and that he had ridden with Asheraft in his car. At this time the latter made some remark and Ware asked the officers if they wanted the truth. He turned to Asheraft and said, in substance, "I told you, Mr. Johnnie, when this matter came up if we got into any trouble, I was not going to take all the blame." According to the officers present this statement was made by Ware within five minutes after he was brought to the jail.

It appears that both Ware and Asheraft later made written confessions. When this case was last heard on appeal *he* held that these confessions were voluntarily made and therefore competent. (From this holding the writer of this opinion dissented as to Asheraft, but filed no opinion with the record.) The Supreme Court of the United States reversed both convictions, holding expressly that Asheraft's

confession was the result of coercion. However, it appears from the dissenting opinion of Mr. Justice Jackson that Ware's case was not decided on the merits. He said, "Why should not this Court desire Ware's case on the merits and thus test and expound its novel ruling as applied to a different set of circumstances?" In referring to Ware's [fol. 434] confession Mr. Justice Black said:

> "Ware's confession was sustained by the Tennessee Supreme Court on the assumption that Ashcraft's confession was properly admitted and his conviction valid. Whether it would have been sustained had the Court reached the conclusion we have reached as to Ashcraft, we do not know."

We think it thus clearly appears that the Court, for the reasons stated, did not pass on the federal question raised by Ware. Moreover, it was suggested by the State that if the Court reversed the case as to Ashcraft, it should do likewise in the case of Ware.

We now consider the question of whether or not Ware's confession was obtained by coercion. It is not denied that he knew his co-defendant and that he had ridden in his car with him. It was his contention that when the officers arrested him late in the night he was greatly frightened and that he was handcuffed and beaten; that he inquired why he was arrested and an officer replied that he would find out. Upon reaching the jail he was taken to the fifth floor along with Ashcraft. He stated, speaking of Ashcraft, "I didn't know him by Mr. Ashcraft, I knew him as Mr. Johnnie, that is all." Mr. Becker asked him why he wanted [fol. 435] to kill this man's wife. "I said I hadn't killed his wife." That the officers cursed him and said, "You know you did." That he was locked up in a secret cell. He contended that when he was brought to the jail he was told that if he did not admit the crime "they were going to take me out to a mob." That it was under these threats and mistreatment he confessed. All the foregoing statements were denied by the officers. It was their insistence that he was not harmed in any way; he was not threatened by a mob; that he admitted his guilt within five minutes after being brought to the jail. The Court Reporter who took down his confession said he asked him how they had treated him and he said all right. There were no marks of

violence upon Ware's body. The trial judge, in the absence of the jury, heard the proof as to alleged intimidation and coercion and held that the confession was voluntarily made. He later submitted the question to the jury and left it to them as to the weight to be given to it.

The defendant in his confession stated Asheraft agreed to pay him, and he was paid, fifty dollars "for the job." He described in detail how he appeared at the home of Asheraft by appointment and that he drove to a point on the Raleigh Road where he pushed Mrs. Asheraft into the lake; that he struck her on the head with some rocks as she lay in the water. Ware repudiated this confession in its entirety.

[fol. 436] Considering the entire record, we think this confession was not made under duress. Of course, it was not competent as to Asheraft, and the trial judge so instructed the jury. The jury gave credence to this confession and, along with other circumstances, returned a verdict of guilty.

In addition to the confession the following facts are more or less significant. The record shows that Ware had worked at his place of employment prior to the homicide for seven and a half to eight hours each day. On the morning following the homicide he only worked two hours, saying he was sick. He did no more work for the next four days. Still another strong circumstance against him is that the officers found a muddy foot print on the front seat of the car. It was preserved by spraying acid upon it and later a shoe of defendant was shown to have fitted this foot print perfectly.

On Tuesday following his confession the day before, the officers placed him in a car and took him to his home. According to these officers he directed them from his home to the home of Asheraft. From that point, they testified, he carried them over the route travelled by him to the scene of the homicide and there described the actual killing.

There is no evidence that Ware had ever been in any serious trouble before. Several witnesses who testified for him said his general character was good. He is a young [fol. 437] negro, about twenty years of age, and is of a type no doubt that could be easily influenced.

We have carefully considered the confession and find it rather difficult to understand how this boy could give in such detail the story of his participation in a crime that was

the result of pure fancy or imagination and wholly false. He was asked no leading questions during his entire examination.

Considering the entire record, we think the evidence does not preponderate in favor of his innocence. We are of the same opinion as to Ashcraft.

Responding next to Ashcraft's assignment of error that the trial judge should not have admitted testimony as to oral statements or declarations by him because they were in effect incorporated into a later written confession which had been adjudged incompetent by the Supreme Court of the United States, it is contended that everything that was said in what has been called "the confession chamber" was the result of coercion and should be excluded. Ashcraft had been questioned by various officers from Saturday night through Sunday and at eleven o'clock, P. M., he said, "It looks like circumstances point to me." He continued however to deny his guilt. Several hours later, and following further questioning, he implicated Ware. The officer re- [fol. 438] plied, "If you are putting a negro in this thing, you hired him to do it." Ashcraft said, "I did not; I had nothing to do with it." The defendant then described how he found Ware in the back seat of his car when he and his wife went out; "that the negro put his arm around her and got her pocket book, and he told her this was a hold-up." Afterwards the negro got in the front seat and told her to back the car out and she started to back the car out and the negro turned to Ashcraft and said, "You old bald-headed son of a bitch, get back in the house and if you say anything about this I am coming back and burn the house down." And the negro drove off. When asked why he did not call the law, as he had a telephone, he replied, "that he was a mean negro and he was afraid of him." (Tr. pp. 154-155.) All of the above recitation constitutes the oral statements or admissions that defendant's counsel asked to be excluded, along with the written confession, insisting that it was the result of coercion. It was some time after this that Ashcraft made a full confession of guilt which was taken down by Mr. Waldour and transcribed. He refused to sign it, saying he wanted to see his lawyer. The defendant did not testify at the present trial, relying upon his contention that there was no evidence against him other than the confession or statement which should have been excluded. This writ-

ten confession was not admitted as evidence, and of course is not in the records.

[fol. 439] The foregoing oral statement to which we have made reference is not a confession. It was a complete denial of his guilt.

We understand the majority rule to be that only confessions that are made under duress are inadmissible against an accused. Oral statements protesting innocence are not excluded.

Mr. Wigmore has dealt with the question now before us in which a distinction is made between confessions of guilt and "exculpatory statements." Third Ed., Vol. 3, sec. 816; see notes to the text.

In State v. Novak, 109 Ia. 717, 79 N. W. 465, it is said:

> "A confession is a voluntary admission or declaration by a person of his agency or participation in a crime. * * * To make an admission or declaration a confession, it must in some way be an acknowledgment of guilt."

In Vol. 20, Am. Jur., Evidence, Sec. 560, p. 474, we find the following:

> "The majority rule, however, recognizes the distinction between an admission of an independent fact and a confession which amounts to an acknowledg-
> [fol. 440] ment of guilt and asserts the principle that it is unnecessary for the prosecution to prove that an admission, as distinguished from a confession, was freely and voluntarily made without improper inducement in order to have it admitted in evidence."

A number of cases are cited to support the text.

In Palmer v. State, 145 So. 70, it was held, "When a person only admits certain facts from which a jury may, or may not, infer guilt, there is no 'confession' as that term is understood in the Criminal law." Citing Covington v. State, 74 Ga. 687, 7 S. E. 153. To the same effect see McGarrah v. State, 187 Pac. (Okla.) 505, citing State v. Reinhart, 26 Ore. 466, 38 Pac. 822; Wilson v. State, 183 Pac. 613. State v. Broughton, 7 Ired, 101, cited in Wigmore, Vol. 3, p. 240; Commonwealth v. Gleason, 158 N. E.

(Mass.) 518; McGehee v. State, 171 Ala. 19, 55 So. 159. In the latter case it was said:

> "By the weight of authority, inculpatory admissions not amounting to a specific confession of guilt require when offered by the state no preliminary proof of their voluntary character. 1 Gr. Ev. (16th Ed.) pp. 346, 347; 6 A. & E. Ency. Law, p. 557; 12 Cyc. 419."

[fol. 441] In this case the defendant was charged with killing a child bc . to his step-daughter. He first denied his guilt, after being questioned for several hours by Graydon. Later, after being committed to jail, he admitted being present when the child was born, but accused his wife of committing the crime. The admission was held competent, the Court saying:

> "The rule as to confessions cannot be applied to denials, and hence *we do not inquire as to the nature or effect* of the importunities of the witness Graydon on this occasion."

The question was fully considered by the Supreme Court of Colorado in O'Loughlin v. People, 90 Colo. 368, 82 A. L. R. 622. The accused was convicted of murdering her step-daughter, Leona O'Loughlin. The prosecution proved certain statements made by the defendant and objected to as not being voluntary but made under duress. The statement, which was in the nature of an alibi, was held to be admissible. The Court cited Mora v. People, 19 Colo. 255, wherein it was said:

> "While we think the preponderance of the evidence tends to show that these statements were freely and voluntarily made, *yet their admissibility in evidence does not depend upon such fact.*" (Italics ours.)

[fol. 442] While there is a strong dissenting opinion in this case, we think the majority opinion is sustained by the weight of authority.

It is argued by counsel for defendant with great force that the statement of Ashcraft, while exculpatory in effect, was highly prejudicial. The same contention was made in Palmer v. State, supra, and the Court in response thereto said:

> "The fact that the net result was to have the admissions contained in the exculpatory statement operate

as links in the chain of circumstantial evidence from which the jury inferred guilt cannot convert the statement in question into a 'confession' per se."

It results from these authorities that the statement complained of was not improperly admitted.

Counsel for defendant has cited Malinski v. New York, —— U. S. ——, 89 L. ed. 738, as controlling the instant case. We have carefully read not only the majority opinion but the dissenting opinion. We think the facts of that case differ from the facts of the case now before us. It there appeared that Malinski had made damaging admissions of guilt. Here, Asheraft denied from the beginning that he had any part in the murder of his wife.

[fol. 443] It is next assigned as error the refusal of the trial judge to grant the defendant Asheraft a severance. His motion for a severance was based upon the ground that his defense was antagonistic to his co-defendant Ware; that proof of Ware's confession and other statements were prejudicial. An examination of the record shows that the trial judge took pains to tell the jury that a statement or alleged confession by either of the defendants, made out of the presence of the other, should not be considered against him. The Court in his charge to the jury expressly told the jury that such statements were not to be considered for any purpose. (Tr. pp. 390-392.) The law governing the granting of a severance is fully discussed in Kennon v. State, 181 S. W. 364, wherein it is held that the granting of a severance rests within the sound discretion of the trial court. In that case certain defendants made confessions implicating the plaintiff in error, and the trial judge instructed the jury as was done in the instant case. The trial court did not abuse his discretion in denying a severance and his action in this regard was sustained. See also Woodruff v. State, 164 Tenn. 530, 51 S. W. 2d 843, 845. The argument of the State, after citing certain authorities, is a complete answer to the charge arising from the introduction of Ware's confession. It is as follows:

"If Asheraft had been tried separately these confessions of Ware would have been admissible against him, not for the purpose of showing his own guilt, but [fol. 444] for the purpose of showing the guilt of Ware as principal, and it was only for this purpose that

these confessions were admitted in the present trial." Givens v. State. 103 Tenn. 648, 661.

We are constrained therefore to hold that the denial of a severance presents no reversible error.

It is next earnestly insisted by both defendants that the trial judge erred in not permitting counsel for Ashcraft to read the entire majority opinion of the Supreme Court of the United States upon the former appeal of this case; that such refusal was in violation of the defendant's constitutional rights. Counsel for defendants, in an elaborate brief and in oral argument, has stressed the law and the facts as found in Malinski v. New York, supra, and insists that it was his right to read to the jury the decision in that case as well as the holding of the Court in the instant case. The same argument is made in behalf of Ashcraft.

We have heretofore pointed out that the Court did not dispose of Ware's case "on the merits." This appears from the dissenting opinion of Mr. Justice Jackson, as well as the majority opinion of the Court. The effect of the majority opinion was to wholly eliminate the written [fol. 445] confession of Ashcraft, and while there was some comment on Ware's confession, the federal question raised by him was not decided. The trial judge was not in error in refusing to permit counsel to read to the jury the Court's finding of facts and coment thereon. It was only proper to say to the jury that this confession had been held inadmissible. When the question arose as to the admissibility of oral statements and admissions, in which there was no confession of guilt, it was a matter for the trial court to decide.

The facts of the Malinski case and decision of the Court were solely for the consideration of the trial judge in ruling upon the admissibility of oral statements. Having decided the question adversely to the defendants' contention, it remained for the jury to determine what weight, if any, should be given these statements and admissions. Counsel were not precluded from arguing this issue to the jury. Under the ruling of the Supreme Court of the United States the question of the admissibility of Ware's confession was left open for decision by the trial court upon the remand. Whether or not a confession is free and voluntary, or made under duress, is a question of fact to be preliminarily decided by the Court. If held competent, its weight is for

the jury. The same is true as to oral statements and alleged admissions. It was only proper for the Court and counsel to say to the jury that Ware's case, on appeal, had not been decided on the merits. Argument as to what was [fol. 446] said by Mr. Justice Black to General Tipton and the latter's reply was not a matter for the consideration of the jury. Had the trial judge permitted counsel to read the opinion, including the colloquy above referred to, the jury would have been in hopeless confusion as to whether or not it was a mandate from the High Court to "dismiss the case." The trial judge had previously overruled counsel's motion to dismiss, thus deciding this very question. Now it was evidently the desire of counsel to read this opinion and argue to the jury that it was their duty to overrule the trial judge and dismiss the case. The action therefore of the trial judge in refusing counsel the right to read this opinion to the jury and comment thereon was proper.

We have given careful consideration to each and every assignment of error. While all are more or less controversial, and some have a degree of merit, we think no reversible error was committed and the judgment of the lower court is affirmed.

(Signed) Neil, J.

[fols. 447-451] In Supreme Court of Tennessee

E. E. Ashcraft and John Ware, Alias Tom,

vs.

The State

Judgment

Shelby Criminal. Affirmed

Came the plaintiffs in error in proper person and by counsel, and also came the Attorney-General on behalf of the State, and this cause was heard on the transcript of the record from the Criminal Court of Shelby County; and on consideration thereof, the Court is of opinion that there is no reversible error on the record, and that the judgment of the Court below should be affirmed, and it is accordingly so ordered and adjudged by the Court.

It is therefore ordered by the Court that the plaintiffs in error, for the offense of murder in the first degree and

accessory before the fact, etc., as charged in the indictment, be delivered to the Warden of the penitentiary, or his agent, and be by him conveyed to the penitentiary of the State of Tennessee and there confined at hard labor for the balance of their natural life, commencing on the day of his reception at said penitentiary.

It is further ordered by the Court that plaintiffs in error be infamous and disqualified from holding any office under this State, or exercising the elective franchise, or giving evidence in the Courts of this State. The plaintiff- in error will pay the costs of the cause accrued in this Court and the Court below, and execution may issue from this Court for the costs of the appeal. A procedendo will be issued to the said Criminal Court of Shelby County directing that Court to proceed with the collection of the cost of the cause accrued herein in the manner provided by law.

The Clerk of this Court will issue a duly certified copy of this judgment to the Sheriff of Shelby County, which will be his authority for delivering the plaintiffs in error to the Warden or his agent; and also a duly certified copy hereof to the Warden of the penitentiary who will at once proceed to execute this judgment.

[fol. 452] SUPREME COURT OF THE UNITED STATES

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS—December 3, 1945

On Consideration of the motion for leave to proceed *in forma pauperis* in this case,

It Is Ordered by this Court that the said motion be, and the same is hereby, granted.

Mr. Justice Jackson took no part in the consideration or decision of this motion.

[fol. 453] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 3, 1945

The petition herein for a writ of certiorari to the Supreme Court of the State of Tennessee is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied

the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

Endorsed on cover: Enter James F. Bickers. In forma pauperis. File No. 50,084. Tennessee Supreme Court. Term No. 381. E. E. Ashcraft and John Ware, Petitioners, vs. State of Tennessee. Petition for a writ of certiorari and exhibit thereto. Filed August 28, 1945. Term No. 381 O. T. 1945.

FILE COPY

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FILED
AUG 28 1945
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 381

E. E. ASHCRAFT AND JOHN WARE,
Petitioners,

vs.

STATE OF TENNESSEE

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

JAMES F. BICKERS,
GROVER N. MCCORMICK,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 381

E. E. ASHCRAFT AND JOHN WARE,
Petitioners,

vs.

STATE OF TENNESSEE

PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The case of these defendants has once been considered and passed upon by this Honorable Court, as was thought to a finality, *Ashcraft* v. *Tennessee,* 322 U. S. 143, 64 S. Ct. 921, 88 L. Ed. 1192. However this may be, they find that it is necessary in justice to themselves and to the end that their rights may be further, fully, and finally preserved to file in this Court this Petition for certiorari to the Supreme Court of the State of Tennessee.

Petitioner John Ware was indicted by the Grand Jury of Shelby County, Tennessee, and was charged with the mur-

der of one Zelma Ida Ashcraft in Shelby County, Tennessee. Petitioner E. E. Ashcraft was indicted by the same Grand Jury jointly with John Ware and was charged with the murder of Zelma Ida Ashcraft, his wife, and in a second count of said indictment was charged with being an Accessory before the Fact of the said murder.

They have been tried a third time by a Jury in Division One of the Criminal Court of Shelby County, Tennessee, convicted and sentenced to serve a life-term in the Tennessee State Penitentiary.

An appeal was perfected to the Supreme Court of Tennessee and on June 9, 1945 that Court affirmed the judgment of the lower court.

Your Petitioners are filing this Petition in this Honorable Court asking for a review of this case to the end that their rights may be by this Honorable Court further protected, and finally adjudicated. We are presenting to the Court with this Petition the complete authenticated record filed in the Supreme Court of Tennessee in this case.

A Foreword

For the information of the Court we desire to concisely set out just what transpired after this Honorable Court handed down its opinion in the *Ashcraft* case and before these defendants were forced to a third trial in the First Division of the Criminal Court of Shelby County, Tennessee.

The Court will remember that when this case was argued before it, the Representatives of the State of Tennessee, The Honorable Nat Tipton of the State's Attorney General's Office and the Honorable William Gerber, District Attorney General of Shelby County, Tennessee, admitted and conceded in open Court that, with the alleged admissions and confessions, so designated, secured from these

defendants in the "confession" chamber on the fifth floor of the Shelby County Jail out of the record and declared illegal, there was left no evidence upon which a conviction could rest or which would in any way connect these defendants with the commission of this crime.

This Court declared illegal Ashcraft's confession because his Constitutional Rights were invaded in securing it and reversed his case.

This Court in the light of the circumstances and the admissions and concessions on the part of the legal representatives of the State of Tennessee vacated the judgment of the State Court as to Ware and sent it back for further consideration and disposition.

Thereupon there was filed in the Supreme Court of Tennessee in behalf of Ashcraft and Ware a motion to dismiss the case and restore to these defendants their liberties. The Supreme Court was particularly asked to pass upon the legality of Ware's alleged admissions and confessions and declare them invalid in the light of the opinion and mandate of this Honorable Court as to Ashcraft.

A copy of this motion is attached to this Petition marked Exhibit "D".

In answer to defendants written motion in the Supreme Court of Tennessee there was filed an answer by the Honorable William Gerber, Attorney General of Shelby County, Tennessee. A copy of which is attached hereto and marked Exhibit "E".

In this answer we find the following Statement:

> "The respondent most emphatically denies that a conviction cannot be sustained against the defendant Ashcraft without his confession, which was made shortly after the commission of this atrocious crime."

The position of the State of Tennessee taken in its answer in the Supreme Court of Tennessee after this Honorable

Court had handed down its opinion was diametrically opposed to the position taken in this Court.

In the answer the District Attorney General was careful not to say that he had any newly discovered evidence or any additional available evidence against these defendants. All that he said was that he could convict them. Upon further consideration of the case the Supreme Court of Tennessee overruled the motion of these defendants stating among other things that to grant it would be exercising original jurisdiction. It reversed the case as to both defendants and remanded it to the First Division of the Criminal Court of Shelby County, Tennessee not for a new trial but

> "for such further proceedings as will not be inconsistent with the judgment and mandate of the Supreme Court of the United States".

The Supreme Court of Tennessee would not or did not specifically rule upon the legality or the admissibility of Ware's confession even though it was urged to do so in Ware's motion and even though this Honorable Court in its opinion "remanded his case to that Court for further proceedings", for its ruling on that very question.

The legality of Ware's confession was the only question in issue. There existed no other ground for reversal.

The Supreme Court of Tennessee said in this regard, and it is all that it did say, on this point as follows:

> "Both the defendants Asheraft and Ware were convicted of murder in the First Degree upon the person of Mrs. Asheraft, wife of the defendant Asheraft. There were certain alleged confessions admitted on the trial of this case. Following the convictions of both defendants, there was an appeal to this Court, and the convictions as to both of the defendants were affirmed, the Court holding that the alleged confessions were properly admitted. A subsequent review of the convictions by the Supreme Court of the United States

resulted in a reversal of the judgment of this Court, that Court holding that the alleged confessions were illegally obtained and were not therefore admissible in evidence."

It is obvious from the above quotation that the Supreme Court of Tennessee interpreted the opinion of this Honorable Court to hold in effect that to Ware's confession was illegal as well as Asheraft's.

At least, that is what the Supreme Court of Tennessee said on the subject and it is all that it said. With this comment, it simply reversed the case as to Ware.

Thereupon, there was filed in behalf of the defendants in the Criminal Court of Shelby County, Tennessee three motions in which they asked the Court to examine the record considered by this Honorable Court and, by proper precedure, upon the opinion of this Honorable Court, the memorandum opinion and procedendo of the Supreme Court of Tennessee, the admissions, concessions, representations, and requests of the Attorneys representing the State of Tennessee in this Court in oral argument, and in briefs filed, have entered a verdict of Not Guilty in their behalf.

These motions are found in the first pages of the record in this case filed herewith.

The Trial Court upon a hearing refused to examine the printed record considered by this Court or to give import to or accept the admissions and concessions of the Attorneys representing the State of Tennessee in this Honorable Court "That the convictions could not be sustained without the confessions".

He refused to examine the record to ascertain whether, as a matter of law, there was any evidence in the record with the confessions of Asheraft and/or Ware elided to sustain a conviction or to longer keep these defendants incarcerated.

He refused to examine the record to ascertain whether or not in the light of the opinion of this Honorable Court and the memorandum opinion of the Supreme Court of Tennessee Ware's confession was legal. He refused to read the record considered by this Honorable Court, didn't know what was in it, refused to rule on the status of these defendants even though the Supreme Court of Tennessee had referred the case to him not for a new trial but

> "for such further proceedings as will not be inconsistent with the judgment and mandate of the Supreme Court of the United States".

The Court overruled these motions and forthwith and arbitrarily put these defendants to a Third Trial.

Exception to the action of the Court was seasonably entered, it being the position of Ashcraft that the State of Tennessee through its legal representative had conceded that with his confession out of the record there was no evidence upon which to further hold him and that there was, as a fact, no evidence in the record upon which to further hold him and that to arbitrarily put him to a Third Trial would constitute "unfair practice", persecution, a further violation of his constitutional rights, due process, and would be inconsistent with the opinion, judgment, and mandate of this Honorable Court and an affront to orderly and proper administration of criminal justice.

It was the position of Ware in his exception that it was the interpretation of the Supreme Court of Tennessee of the opinion of this Honorable Court that his confession was illegal and that he could not be convicted upon it, and that there was no evidence in the record that even presented a suspicion against him, and that, in any event, the Supreme Court of the State of Tennessee remanded his case to the Judge of the Criminal Court of Shelby County, Tennessee, not for a new trial, but for the Court to examine the record

and in the light of the opinion of this Honorable Court, and the admissions and concessions of the legal representatives of the State of Tennessee, rule upon the legality of his alleged confession as a matter of law, and for proceedings not inconsistent with the opinion of this Honorable Court.

It was his further position that he was entitled to have his case, or this legal question involved in it, determined by some Court in Tennessee on the record as made and considered by this Honorable Court and that to put him to trial a third time under these circumstances without such a ruling would constitute "unfair practice", persecution, a further violation of his constitutional rights, due process, and would be inconsistent with the opinion, judgment, and mandate of this Honorable Court and an affront to orderly and proper administration of criminal justice.

If the Court had considered the motion of these defendants, examined the record and opinion of this Honorable Court he would have been forced as a matter of law to liberate them. They were entitled to this consideration by the Court. If the Supreme Court of Tennessee was not going to act on their case in the light of the opinion and mandate of this Honorable Court the trial court should have done so under instructions from the Supreme Court of Tennessee in its mandate.

The action of the Trial Court in overruling the motion of these defendants was assigned as error in the Supreme Court of Tennessee in this case.

Your petitioners would show to the Court that they filed a motion in the criminal court of Shelby County, Tennessee for the presiding Judge R. G. Kinkle to recuse himself upon the grounds that at the time of the murder of Mrs. Ashcraft and the investigation of the crime was being proceeded with, he was then a member of the staff of the Prosecuting Attorney General William Gerber and that the

entire force was being used on Ashcraft and Ware to secure confessions. This motion by Judge Kinkle was granted and he recused himself. Under the statutes of the State of Tennessee the recused Judge selects a Judge to preside for him. Judge Kinkle selected a recently appointed Circuit Judge, the Honorable John Wilson, to preside in this case and he heard the aforementioned motions.

Thereupon, a motion was made to have Judge Wilson recuse himself. After the first trial of these defendants had been had and before a Bill of Exceptions could be signed by the then presiding Judge Philip Wallace, the said Judge Wallace died. The Honorable John Wilson then a practicing Attorney at the Memphis Bar was by the Lawyers elected to preside over the First Division of the Criminal Court of Shelby County, Tennessee. The Bill of Exceptions of the First Trial was then presented to Judge Wilson for examination, authentification, and certification to the Supreme Court of Tennessee on appeal. He knew nothing of the case, of its proceedings, but upon examination of the record and Bill of Exceptions he certified it to the Supreme Court as being a true and correct copy of all the proceedings had in the case and authenticated all the exhibits, among them being the two alleged confessions of these defendants, E. E. Ashcraft and John Ware. In the light of these facts this motion for him to recuse himself was made. This was overruled and the defendants ordered to trial forthwith.

Upon the hearing of the preliminary motions above discussed, it became apparent to respective Counsel representing these defendants that an effort would be made by representatives of the State to again introduce in evidence for the consideration of a Jury the so-called confession of John Ware. It was also perfectly apparent that, if this was done, it would be an utter impossibility for defendant Ashcraft

to secure a fair and impartial trial. Ware's alleged confession is of such a highly prejudicial character against Asheraft that its use in a joint trial of them would be not only prejudicial but fatal to a fair and impartial trial of him. Efforts on the part of the Trial Court in this situation, try as he might, could possibly allay this fatal prejudice.

Thereupon, there was seasonably filed in behalf of the defendant Asheraft a Motion for Severance.

This Motion is found in the first few pages of the record.

The Court promptly overruled this Motion, to which action an exception was entered.

This action of the Court was assigned as error in the Supreme Court of Tennessee on appeal.

MAY IT PLEASE THE COURT:

We have set forth for the benefit of this Honorable Court just what transpired in this case involving these defendants from the time of the handing down of the opinion of this Court to the going-into the actual trial of this case for a Third Time.

It is submitted that everything that has transpired since the overruling of the motions of these defendants has been in disregard of, and inconsistent with the holding and opinion of this Honorable Court, and in violation and in disregard of the Constitutional Rights of these defendants. After all, these defendants are human beings, human rights are at stake and these rights have been shunted from Court to Court in Tennessee while they personally suffered incarceration in the Penitentiary of the State.

The Tennessee Courts should have put an end to this litigation and not forced these defendants to an ordeal of a Third Trial on the same evidence from the same wit-

nesses, and none other, that appeared in the record considered by this Honorable Court.

The opinion and mandate of this Honorable Court in this case was, we think, plain and positive.

It should have been gracefully and in a sportsmanlike manner accepted. No efforts should have been put forth to evade, circumscribe, or circumvent either its letter or spirit by either the Legal Representatives of the State of Tennessee or any other Agency. Both the Constitution of the United States and the orderly and proper Administration of criminal justice forbid it.

Statement of the Case

The same facts are found in the record here as were embodied in the record heretofore considered by this Court. The same witnesses testified to the same facts. There are no new facts in this record. The same controlling errors will be assigned hereafter as were found in our former petition for Certiorari.

These defendants stand convicted here in this record on the same testimony that appeared in the record before considered by this Court, secured from them on the fifth floor of the Shelby County Jail, the "confession chamber" as it was designated by this Court, through coercion, intimidation, long quizzing and threats of mob violence and mental and physical torture. They stand convicted out of their own mouths.

The case of Ware is precisely the same case. There is not one iota of difference.

The same witnesses that testified before for the State of Tennessee were allowed, over the objection and exception of the defendant Ashcraft, to testify before the Jury to everything that went on and transpired between him and the representatives of the Attorney General's Office in the

"confession chamber" for approximately thirty-six hours. The only evidence left out of this record that appeared in the other record is the typewritten instrument alleged to be the typewritten unsigned confession of Ashcraft, and the alleged admission of Ashcraft that Ware's confession was true, made by him when it was presented to him on Monday morning, June 16th, at the end of this thirty-six hour ordeal of coercion and inquisition in the presence of Banker Castles and Business-man Pidgeon brought in for the ceremony and celebration.

The trial court took the view that this Honorable Court ruled inadmissible only the typewritten instrument alleged to be the confession of Ashcraft and allowed Homicide Officer Becker, other Officers and Representatives of the Attorney General's Office to rehash and testify again to all of the oral conversations, quizzings, and incriminations had with Ashcraft in the "confession chamber" for a period of thirty hours or more. This Court had held illegal as evidence everything that transpired between Ashcraft and all of these various officers in this room of inquisition. Yet, the trial court erroneously permitted it to go to the Jury for its consideration and the Supreme Court of the State of Tennessee has affirmed.

Ashcraft stands convicted upon it and the prejudicial confession of Ware, so-called, in spite of the bar to it of the Constitution of the United States, and Due Process, and in the face of the plain and unambiguous opinion of this Honorable Court.

As aforesaid, the same witnesses testified in this case to the same facts as testified in the record considered by this Honorable Court before. There are presented no new facts by any new witnesses.

Here they are:

This Record	*The Other Record*
George A. Becker	George A. Becker
Robert Ezell	Robert Ezell
Henry Waldauer	Henry Waldauer
Dr. J. A. McQuiston	Dr. J. A. McQuiston
W. Preston Battle	W. Preston Battle
H. L. Jayroe	H. L. Jayroe.

Again we submit that these defendants stand convicted, solely and alone, on illegal evidence secured from them by Prosecuting Officers of Shelby County, Tennessee, by illegal means, coercion, intimidations, and inquisitions without the aid of counsel or friends, on the 5th floor of the Shelby County Jail, a "confession chamber", in violation of their Constitutional Rights. They were forced to convict themselves in a Star Chamber forbidden by the Constitution of the United States.

It is submitted that there are raised here in behalf of these defendants substantial Federal questions borne out by the record, and that this Honorable Court has already so found on the same evidence in a former, similar record.

Specification of Errors

1. THE TRIAL COURT AND THE SUPREME COURT OF TENNESSEE ERRED IN NOT SUSTAINING THE MOTIONS FILED IN THEIR BEHALF, FOR THE REASONS STATED THEREIN, TO DISMISS THEIR CASES AND TO RESTORE THEIR LIBERTIES TO THEM, THIS BEING THE ONLY LEGAL PROCEDURE CONSISTENT WITH THE OPINION OF THIS HONORABLE SUPREME COURT OF THE UNITED STATES.

DEFENDANT ASHCRAFT SAYS THAT, AS TO HIM, NO OTHER POSSIBLE LEGAL ACTION COULD BE TAKEN OTHER THAN TO DISMISS HIM.

DEFENDANT WARE SAYS THAT THE SAME ACTION SHOULD HAVE BEEN TAKEN BY THE COURT AS TO HIM ON THE MERITS OF HIS CASE AND UPON THE RECOMMENDATIONS OF THE ATTORNEY GENERAL OF THE STATE OF TENNESSEE.

2. DEFENDANT ASHCRAFT SAYS THAT THE TRIAL COURT ERRED IN NOT GRANTING HIS MOTION FOR A SEVERANCE FOR THE REASONS STATED, AND THAT THE SUPREME COURT OF THE STATE OF TENNESSEE ERRED IN SUSTAINING THE ACTION OF THE LOWER COURT.

HE SAYS THAT IT WAS, AND IS, GLARINGLY APPARENT THAT HE COULD NOT GET, AND DID NOT GET, A FAIR AND IMPARTIAL TRIAL JOINTLY WITH HIS CO-DEFENDANT WARE WITH THE USE OF WARE'S ALLEGED CONFESSION AS EVIDENCE AT THE HEARING.

THIS WAS ERROR BECAUSE HIS CONSTITUTIONAL RIGHTS COULD NOT BE PROTECTED AND PRESERVED AND THE ACTION OF COURT WAS VIOLATIVE OF "FAIR PRACTICE", DUE PROCESS, AND ORDERLY ADMINISTRATION OF CRIMINAL JUSTICE.

3. DEFENDANT ASHCRAFT STANDS CONVICTED AT THE HANDS OF THE STATE OF TENNESSEE ON ILLEGAL EVIDENCE SECURED FROM HIM ILLEGALLY BY THE PROSECUTING OFFICERS OF SHELBY COUNTY, TENNESSEE. THE SUPREME COURT OF TENNESSEE ERRED IN SUSTAINING HIS CONVICTION ON THIS EVIDENCE GIVEN BY HOMICIDE OFFICER BECKER AND OTHER STATE WITNESSES IN THE NATURE OF CONVERSATIONS, ADMISSIONS, QUIZZINGS, INCRIMINATIONS, FACTS AND CIRCUMSTANCES RELATIVE TO THE KILLING OF HIS WIFE, TRANSPIRING AND TAKEN FROM HIM BY COERCION, DURESS, AND LONG QUIZZINGS WITHIN THE "CONFESSION CHAMBER" ON THE FIFTH FLOOR OF THE SHELBY COUNTY JAIL OVER A PERIOD OF APPROXIMATELY THIRTY-SIX HOURS.

THIS WAS ERROR BECAUSE SAID EVIDENCE WAS ILLEGAL TO BE USED AGAINST HIM FOR ANY PURPOSE AND SECURED IN A MANNER VIOLATIVE OF HIS CONSTITUTIONAL RIGHTS AND PARTICULARLY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

IT WAS ERROR, FOR THE FURTHER REASON, THAT THIS HONORABLE SUPREME COURT OF THE UNITED STATES HAD IN ITS OPINION HELD SAID EVIDENCE TO BE ILLEGAL, COERCIVE, INVOLUNTARY AND INADMISSIBLE AGAINST HIM FOR ANY PURPOSE.

DEFENDANTS IN THIS CASE, BOTH OF THEM, STAND CONVICTED UPON ILLEGAL AND INADMISSIBLE EVIDENCE IN THE NATURE OF ALLEGED CONFESSIONS, ADMISSIONS, AND INCRIMINATING STATEMENTS TAKEN FROM THEM BY THE PROSECUTING OFFICERS OF SHELBY COUNTY, TENNESSEE, IN THE "CONFESSION CHAMBER" ON THE FIFTH FLOOR OF THE SHELBY COUNTY, TENNESSEE JAIL THROUGH COERCION, INTIMIDATION, ABUSE, THREATS OF MOB VIOLENCE, AND IN VIOLATION OF THEIR CONSTITUTIONAL RIGHTS AND PARTICULARLY THE DUE

PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

THE SAID EVIDENCE WAS IN NO SENSE FREE AND VOLUNTARY AND IT WAS ERROR FOR THE COURT TO SUSTAIN AND CONVICT UPON SAID ILLEGAL TESTIMONY.

IT WAS FURTHER ERROR, FOR THE REASON THAT, THIS HONORABLE SUPREME COURT OF THE UNITED STATES HAD DECLARED SAID EVIDENCE ILLEGAL AND HAD STATED THAT THE CONSTITUTION OF THE UNITED STATES WAS A BAR TO A CONVICTION UPON SUCH EVIDENCE.

Supporting Authorities:

Polk v. *State of Tennessee*, 170 Tenn. 271;
Cross v. *State of Tennessee*, 140 Tenn. 510;
Code State of Tennessee (1932), Sections 11,547, 11,548, 11,549, 11,554 and 11,555;
Brahm v. *United States*, 42 L. Ed. 568, 169 U. S. 532;
Ziang Sung Wan v. *United States*, 266 U. S. 1, 69 L. Ed. 131;
Chambers v. *Florida*, 309 U. S. 227, 84 L. Ed. 419;
White v. *State of Texas*, 310 U. S. 530;
Lomax v. *State of Texas*, 313 U. S. 544;
Vernon v. *State of Alabama*, 313 U. S. 547;
Canty v. *Alabama*, 309 U. S. 628;
McNabb et al. v. *United States*, 87 U. S. L. Ed. 579;
Anderson v. *United States*, 87 U. S. L. Ed. 589;
Malinski v. *People of State of New York*, 65 S. Ct. 781;
Rounds v. *The State*, 171 Tenn. 512;
Wood v. *United States*, 128 F. (2d) 265, 271.

Argument

MAY IT PLEASE THE COURT:

May it be borne in mind by the Court throughout that there is no new evidence in this record presented by any new witnesses that did not appear in the printed record heretofore considered by this Honorable Court. It is all the same. There is absent from this record that appeared in the other

record only what is purported to be a typewritten statement by Asheraft, unsigned and an oral statement alleged to have been made by Asheraft, that Ware's alleged confession was true, made on the early morning of Monday, June 16th, before Banker Castles and Business-man Pidgeon and the Officers when it was presented to him.

The case of Ware is identical with the case presented in the other record. He stands convicted upon his alleged confession and its use, illegally, obviously aided in the conviction of Asheraft.

Both defendants stand convicted on testimony presented as having come from the mouth of these defendants, secured from them in the "confession chamber" on the fifth floor of the Shelby County Jail.

There can be no denial of this statement. This Honorable Court is familiar with all of the details of this case as to both of these defendants.

As to Asheraft, we most respectfully submit that this Honorable Court has already passed upon and decided the issue here. We quote the following from the opinion of this Court:

> "In reaching our conclusion as to the validity of Asheraft's confession we do not resolve any of the disputed questions of fact relating to the details of what transpired within the confession chamber of the jail or whether Asheraft actually did confess. Such disputes, we may say, are an inescapable consequence of secret inquisitorial practices. And always evidence concerning the inner details of secret inquisitions is weighted against an accused, particularly where, as here, he is charged with a brutal crime, or where, as in many other cases, his supposed offense bears relation to an unpopular economic, political, on religious cause.
>
> "Our conclusion is that if Asheraft made a confession it was not voluntary but compelled. We reach this conclusion from facts which are not in dispute at all.

Ashcraft, a citizen of excellent reputation, was taken into custody by police officers. Ten days' examination of the Ashcrafts' maid, and of several others, in jail where they were held, had revealed nothing whatever against Ashcraft. Inquiries among his neighbors and business associated likewise had failed to unearth one single tangible clue pointing to his guilt. For thirty-six hours after Ashcraft's seizure during which period he was held incommunicado, without sleep or rest, relays of officers, experienced investigators, and highly trained lawyers questioned him without respite."

NOW, MAY IT PLEASE THE COURT:

What the Prosecution did in this case, as to Ashcraft, with the permission of the Court, over the objection and exception of the Defendant, was to allow Chief Homicide Officer Becker, other officers, and representatives of the Attorney General's Office to testify to all "the details of what transpired within the 'confession chamber' of the jail" up to the time Ashcraft is alleged to have given his confession on Monday morning, June 16th, at the culmination of his ordeal.

This testimony covers approximately 100 pages of this record.

The typewritten instrument purporting to be Ashcraft's confession or statement, left out of this record but appearing in the other, embodied both the substance and the details of what transpired in the "confession chamber" over the thirty-six hour period of Inquisition. These details consisting of oral statements, conversations, incriminations, etc. were testified to and related in both of these records.

We submit that this Honorable Court in its opinion in this case ruled that all of this evidence was held illegal for use against Ashcraft and that the Constitution of the United States barred a conviction upon it.

This Honorable Court obviously had in mind this very proposition in preparation of its opinion, for the reason that it cited in one of the foot notes of the opinion the case of *Wood* v. *U. S.*, 128 F. 2nd 265.

The opinion in this case was written by Mr. Justice Rutledge. Here it is held that the Constitution protects the right, the privilege of an accused person and its protecting power should be liberally construed. Constitutional rights, the privilege has roots deeper than any single Rule of Evidence.

We have here, in this case of Asheraft's, "unfair practice", coercion, duress, intimidation, basic violation of fundamental constitutional right and privilege. These invalidate and nullify this conviction independently of any so designated Rule of Evidence.

Asheraft is the victim of a prosecutor's inquisition in search of evidence for conviction—evidence from his own lips. This inquisition and search of evidence had both its conception and birth in a preconceived and immutable determination to convict.

We say that to sustain this conviction on this evidence forced from Asheraft by coercion, duress, intimidation and applied psychology would reduce the security and protection of constitutional due process to a mere shadow.

The Court will see from the record that the prosecuting attorney all through the trial of the case referred to this evidence as "circumstantial evidence" or "just what happened up there" meaning in the "confession chamber" and the details of the inquisition as was being testified to by Becker and all of the other witnesses. He urged upon the Court that it was competent as "circumstantial evidence" against Asheraft and "just what happened up there" was competent for the same reason.

In answer, we say that it is elementary that coerced "circumstantial evidence" is just as repulsive and inadmissible as coerced, direct evidence. It is the coercion and duress used in the securing of the so-called evidence that violates the constitutional rights of the accused and nullifies and prohibits its use to convict.

We submit that this Court has already found in its opinion, in this very case, coercion, intimidation, and violation of Ashcraft's Constitutional Rights.

We submit that no evidence that came out of this "confession chamber" of any kind or character can constitutionally be used against Ashcraft to convict him. This has been done. He stands convicted upon evidence, whatever we may call it, from his own lips, that came out of this "confession chamber". Of this there can be no denial. No other evidence is in the record against him.

It was introduced and used at the trial to convict him—used for that purpose and secured, as found by this Honorable Court, in violation of his constitutional rights and the constitution "bars" the conviction.

We may spray this evidence with all the perfumes of Araby and it still has the aroma and the stench of the Star Chamber, the room of inquisition, the "confession chamber" on the fifth floor of the Shelby County Jail.

This evidence, with this offensive aroma, was moved right out of the "confession chamber" down into the Court room and allowed to be paraded before the jury against this defendant Ashcraft.

This conviction, we submit, is a nullity and in violation of the opinion and mandate of this Honorable Court as well as the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

This whole case consists simply of the moving of all the transpirings and the details of what took place in the "con-

fession chamber'' on the fifth floor of the Shelby County Jail during the thirty-six hour inquisition down into the Court Room of the First Division of the Criminal Court of Shelby County, Tennessee, and the presenting of these transpirings and details before a jury which convicted this defendant Ashcraft and defendant Ware as well.

The Constitution of the United States stands as a bar to such a conviction and the orderly administration of criminal justice condemns it.

When we began to give thought to the preparation of our brief to be filed in the Supreme Court of Tennessee in this case, we had not decided just how we would designate this evidence upon which Ashcraft stands convicted. It just so happened that the Advance Reporter of the Opinions' of this Honorable Court came to our desk. We found that Mr. Justice Douglass in his opinion in the case of *Malinski* v. *People of State of New York*, 65 S. Ct. page 781,

gave us the answer, he said

> "Constitutional Rights may suffer as much from subtle intrusions as from direct disregard".

After the opinion of this Honorable Court in this case came down, holding that the State of Tennessee had utterly disregarded the constitutional rights of this defendant Ashcraft, the Representatives of the State of Tennessee took another studied, deliberate, and subtle approach to this case, obsessed with an immutable and more or less fanatical determination to convict—constitutional rights or no constitutional rights, the opinion of this Honorable Court or no.

The subtlety of the legal representatives of the State of Tennessee showed up first when their position was changed. They took the solemn position in this Court that with Ash-

craft's admissions, statements, and purported confession elided from the record that there was no evidence upon which to convict. After the opinion of this Honorable Court came down, they took the position in the Supreme Court of Tennessee and in the trial court that there was evidence in the record upon which they COULD convict.

This constituted a subtle legal somersault.

The subtlety of these representatives showed up a second time when the attempt was made, and successfully, to introduce this evidence or testimony under consideration, consisting of the details of "What happened up there" in the "confession chamber" between the officers and Ashcraft in the "confession chamber" leaving out the written instrument which embodied these details or their substance.

We say that this constituted subtle intrusion upon the constitutional rights of this defendant Ashcraft, forbidden by the holding of this Honorable Court both in the *Ashcraft* and *Malinski* cases.

It constituted an effort to bring in evidence against him through the back door of the Court House when the front door to its entrance had been closed.

The Constitution and the Opinions of this Honorable Court closed both doors.

The subtle intrusion appeared again when the argument of this case to the jury was about to begin. Throughout the trial all reference to the fact that this case had been before this Honorable Court for consideration had been successfully kept from the jury.

Before argument began Attorney General Gerber made a motion that counsel for these defendants be not allowed to discuss the opinion of this Honorable Court to the jury. He did not want the jury to be told of the concession made by the representatives of the State of Tennessee in this

Court—that there could be no conviction without the admissions and confessions of these defendants.

In this regard the Attorney General said:

> "We say that what Nat Tipton said to Hugo Black or what Hugo Black said to Nat Tipton cannot be related to this Jury by the reading of that opinion".

This motion by the Attorney General was sustained by the Court and exception noted.

The attorneys for these defendants were not permitted to argue fully the law and the facts of this case to the jury.

They had a constitutional right to have their Counsel argue fully both the law and the facts of their case. The Opinion of this Honorable Court was part of this case.

It is submitted that defendant Asheraft in this case should have been granted a severance.

This whole case, we respectfully submit, has in its various mazes and ramifications degenerated into a violation of Due Process and it is from this standpoint and in this light that we assign error in not granting Mr. Asheraft severance.

Mr. Justice Douglass in his opinion in the *Malinski* case had the following to say:

> "We have not mentioned Rudish. He did not confess to the Police. He was tried jointly with Malinski, his counsel electing not to ask for a severance."

The clear implication here is that if Counsel had asked for a severance for Rudish it should have been granted. Here in this case, Asheraft's statements and confession had been declared illegal and that it could not be used against him. It was the contention of the State that Ware had made a confession and it was perfectly apparent when the Motion for Severance was made that the Court was going to allow Ware's confession to go to the jury as valid and admissible.

Certainly the effort by the State was going to be made to introduce it.

In this situation the severance should have been allowed. Its use when the defendants were tried jointly was fatal to a fair and impartial trial for Ashcraft.

The Opinions in the *Malinski* case discuss this question at length.

We submit that all of the assignments of error above set out should be by this Court sustained as to Ashcraft and his liberties restored to him by proper mandate.

We shall now, MAY IT PLEASE THE COURT, discuss briefly the case of defendant John Ware.

This Court is thoroughly familiar with the facts of his case, having considered it upon the other record. Precisely the same facts appear in the record.

John Ware at the time of the commission of the crime was a 19 year old negro boy. He was a poor, ignorant, young common laborer. Those of us who know and have lived among this type of young negro boy know that he has and lives in mortal fear of what he calls "the law". A policeman or a deputy sheriff to the young negro boy is known and designated in his lingo as "the law". If there are two policemen he calls them "two laws". If there are more, he designates them as "3, 4, 5, or 6 laws". He doesn't fear the Judge sitting on the bench of the Criminal Court or the Criminal Court Room where the proceedings are held in daylight. It is "the laws" that gives him the shakes. In order to fairly consider this case of John Ware, it must be approached with this picture in the mind's eye.

Now, what do we have here?

Around midnight while he, a young girl, and a young relative of his were sound asleep in one bed in a little sparsely furnished room there suddenly burst in upon him "six or more laws" with flashlights and pistols. He

was told to get up and dress. He says that he was knocked in the head, manhandled, and virtually lifted into the automobile to be taken—he knew not where.

The officers knew when they went out to look for him that they were looking for him as the murderer of Mrs. Ashcraft. They didn't treat him with kid gloves even though they denied striking him.

No argument is necessary for us to draw a just and irrevocable conclusion that from that moment John Ware's will was not his own. In this situation his will was "the law's", officer's, will. It is admitted in the record that he was not told why he was being dragged out of bed, where he was going, or what the officers were going to do with him. No doubt he was stiff with fear.

When he was brought to the jail the combined power and force of both the Sheriff's Office and the Attorney General's Office were applied to Ware. It is admitted in the record that Ashcraft was left completely alone. The Officers and the Attorney General's Office started out for a confession and got it, to their satisfaction.

Hours of pressure were put on him. Ware says that he was threatened with mob violence. He says he was put in a cell of solitary confinement, a dungeon. This cell is in a secret place in the jail and if Ware had not been put in this cell he never would have known of its existence. He testified to this fact on his first trial.

At about 2:00 o'clock in the morning Attorney General Gerber called Court Reporter Waldauer from his bed and told him to come down to the County Jail at once that Ashcraft was about to make a confession and he wanted him to take it down in shorthand.

We know, at that time, that Ware had not made any statements or admissions satisfactory to the Attorney General's Office because he didn't tell Waldauer he wanted him to

take the statement of Ware, even though they had been working on Ware with furious force and power since he arrived at the jail. Ashcraft was left alone all of this time. In fact, according to the record, they never talked to Ashcraft any more until they had secured a satisfactory written statement from Ware.

Ware says that he told the Officers that if they would not hurt him and would not turn him over to the mob, he would say anything that they wanted him to say.

He denies that he had anything to do with the killing and denies that any statements he made were free and voluntary but they were coerced and the product of mortal fear for his life.

It is our insistence that Ware's statement or confession is in any sense free and voluntary and that his constitutional rights were violated and he was forced to give evidence against himself, that the evidence produced against him is illegal and invokes Due Process in his behalf, that he was held incommunicado, persistently and continuously quizzed without the aid of Counsel or friends.

It is submitted that Ware's case should be by this Court reversed and disposed of finally for the following reasons:

First

The motions made in his behalf in the Supreme Court of the State of Tennessee and in the Criminal Court of Shelby County, Tennessee should have been sustained in accordance with the opinion of this Honorable Court and the recommendations and concessions of the Attorneys representing the State of Tennessee.

Second

Because he stands convicted upon illegal evidence in the nature of purported admissions, confessions, and incrimina-

tions, secured from him, involuntarily and illegally and in violation of his constitutional rights and particularly Due Process.

They were secured from him by force, coercion, intimidation, threats of mob violence and by third degree methods.

Third

He was held incommunicado without the aid or advice of friends and was deliberately denied the right of Counsel in violation of his constitutional rights. These are admitted facts in this record.

He is convicted upon evidence purported to come from his own mouth secured from him illegally and presented against him by Officers securing it, and the Constitution of the United States forbids conviction upon it.

The first two of these grounds or reasons presented for reversal have already been discussed in this petition and were fully covered in the former petition filed in this case.

The last ground for reversal, wherein the charge is made that both Ware and Ashcraft were deprived of their Constitutional Right to Counsel, we desire to discuss briefly in the light of this record.

This Court has held in numerous cases, which we deem for the sake of brevity unnecessary to cite, that an accused person is entitled to the aid and advice of Counsel at all times. This is a Constitutional Right.

We solemnly assert, as Counsel for these defendants and as Members of the Bar of this Court, that the Constitutional Rights of these defendants were deliberately, studiously, and purposely violated by the Attorney General of Shelby County, Tennessee, and his Aides and Assistants, and by the Officers of the Sheriff's Office of said County. This record conclusively shows that they were deliberately and consciously deprived of their right to Counsel.

This phase of this case was not developed in the record considered by this Honorable Court before.

We have in Shelby County a Public Defender who is a Public Officer. This office was created by an Act of the Legislature of the State of Tennessee, Chapter 69 of the Private Acts of said Legislature for the year 1917. This office was created for the purpose of defending and protecting, at all times, the Constitutional Rights of poor and indigent persons who may be charged with crime. The duties of this Officer, among other things, are as follows, quoting from the Act:

> "To represent generally, all persons who are without means to employ counsel, who have been indicted by the Grand Jury or charged with the commission of any crime and he shall give counsel and advice to such persons in and about any charge against them."

The Act further states:

> "He shall take and file the Constitutional Oath of Office."

This Office at the time of the commission of this crime was held by an able lawyer in Memphis. He had his office at one end of the corridor of the Criminal Court's Building and the Attorney General of Shelby County had his office at the other end of the corridor.

The Attorney General's Office deals with this Officer every day of the business year. We will say that most of his dealings with him are in the daylight hours in the Open Court Room of the Criminal Court and not upstairs on the fifth floor of the Shelby County Jail in the Inquisition or "confession chamber."

However, this may be, both the Attorney General and all these Officers knew that the Public Defender was subject to call and they knew that it was his legal duty, under

the Statute creating his office, to give counsel, aid and advice to these indigent defendants.

They knew this when they took Asheraft in custody at 7:00 o'clock, on Saturday night, June 14th.

They knew this when they took Ware into custody shortly after 12:00 o'clock on the early morning of June 16th.

They could have called the Public Defender when they called Court Reporter Waldauer to take down statements in shorthand.

From 7:00 o'clock Saturday night, June 14th, throughout this ordeal, according to the record, the Attorney General and the Sheriff's Office was a beehive of activity. They were after confessions from Asheraft and later Ware. The Public Defender was at home over the weekend oblivious of all of these activities.

The Legislature of the State of Tennessee passed this Act and created this office as a bulwark against the mistreatment of and the invasion and violation of the Constitutional Rights of citizens charged with the commission of crime in Shelby County, Tennessee.

Now, neither the Attorney General's Office nor Officers of the Sheriff called in the Public Defender. They deliberately and studiously refused to do this. They wanted these confessions and they knew that they were violating the Constitutional Right of these defendants in the pursuance of their efforts. The Public Defender would have advised them of all of their rights against self-incrimination and all of their rights in this regard. This would have been an interference of the processes of the Attorney General and the Sheriff's Office and they would have none of it,—and did not.

On this subject Mr. Becker, Chief Homicide Officer, testified as follows:

"Q. John Ware had no friends in the room?
A. Didn't have anybody he knew.
Q. He didn't have a lawyer?
A. No, sir; he did not.
Q. He didn't call for a lawyer,—you didn't call for a lawyer for him, did you?
A. No, sir.
Q. There is a Public Defender in Shelby County?
A. Yes, sir.
Q. He is paid lawyer, paid to advise—paid by Shelby County,—to advise and to take care of indigent people, and his services were at your call, were they not?
A. I imagine so, yes.
Q. Why didn't you call him?
A. I didn't see any reason to call. There is no law stating I had to call a lawyer for him or friends.
Q. That is your construction of the law.

Gen. Gerber: I want to make an objection to the argument going on between Mr. McCormick and the witness as to what the law is. Your Honor knows what the law is; I object to that.
Mr. McCormick: He made the statement there was no law.

A. I said I new of no law that required me to call a lawyer, that is right.
Q. How long have you been a Deputy?
A. About 15 years possibly.
Q. You were the head of the Homicide Bureau Office of Shelby County?
A. Yes, sir; that is right.
Q. How long have you had that office?
A. Probably 6 years." (Record Pages 86-87.)

Mr. Becker further testified before the Jury as follows:

"Q. Now of course none of his friends or his people were there?

A. No, sir, they were not.

"Q. And he didn't have a lawyer there?

A. He did not.

Q. Mr. Battle was there representing the State?

A. Mr. Battle was on the investigation.

Q. He is a pretty able Lawyer?

A. Yes, sir.

Q. He represented the State?

A. Yes, sir.

Q. Why didn't you call John Ware a lawyer?

A. I wasn't under any obligation to call him a lawyer. He didn't ask for one and at that time I didn't even know that he needed a lawyer.

Q. When you found out that he did need a lawyer, why didn't you call him one?

A. Because I wasn't under any obligation to call one. He didn't ask for one.

Q. You have been a deputy sheriff in the homicide department for a long time?

A. That's right.

Q. And you have heard these cases tried around here ten or 15 years?

A. Yes, sir.

Q. You know that the constitution of the State requires that John Ware have a lawyer?

A. I know that it doesn't require that I get one for him.

Q. You know that this County has a public defender?

A. I do.

Q. That public defender is paid a salary by this County to represent people like John Ware, a negro without money?

A. He is paid to represent people.

Q. Why didn't you call the public defender?

A. Mr. McCormick, I was under no obligation to call him a lawyer.

Q. You didn't want a lawyer there because you wanted to get a confession from John Ware and convict him?

A. It didn't make any difference to me whether he had a lawyer or not. He didn't ask for one and I didn't get him one." (Record Pages 32-133.)

So the Court can readily see that the violation of the Constitutional Rights of these defendants was deliberate and intentional.

This Honorable Court observes the attitude of General Gerber embodied in the objection made above. In this objection he was obviously over-looking the Constitutional Rights involved and in the open Court Room did not recognize Constitutional Rights.

If the Public Defender had been called in on all of these proceedings and the requirements of the Constitution complied with, all of the disputed questions of fact as to what transpired in the "confession chamber" on the fifth floor of the Shelby County Jail would have disappeared.

We do not have a situation here where, as is usual, a Court is called upon to appoint Counsel to represent helpless defendants. We have in this case a lawyer provided by Act of the Tennessee Legislature and paid a salary to perform this service at all times. We do not have to wait for a Court appointment.

Mr. Justice Rutledge in the case of *Wood* v. *United States*, 128 Federal, Page 267, held illegal as evidence against an accused defendant his plea of guilty both at a preliminary hearing and upon arraignment.

On this question of Constitutional Rights to Counsel we invite the Court's reading of this case.

The aid of counsel in preparation would be farcical if the case could be foreclosed by preliminary Inquisition which would squeeze out conviction or prejudices by means unconstitutional if used at the trial.

We submit, May it Please the Court, that Ware's case was foreclosed against him on the fifth floor of the Shelby

County Jail when his so-called confession was secured without the aid of counsel or friends and through coercion, fear of mob violence, intimidation, and duress.

His Trial in the First Division of the Criminal Court of Shelby County, Tennessee, therefore, was a mere formality.

His only witness "The presumption of innocence" was in the "Confession Chamber" on the fifth floor of the Shelby County Jail taken from him, wrapped up, and placed in a portfolio of the Attorney General of Shelby County, Tennessee, and pulled out of this portfolio at the Trial and used against him.

This proceeding rendered it farcical at the trial for either the State's Attorney or Counsel for the defendants to discuss with prospective jurors that the defendant was presumed to be innocent of the charge upon which he was being tried, and that, that presumption of innocence should stand as a witness for him throughout the trial until overcome by the State by competent and credible proof. The Attorney General as aforesaid had this witness in his portfolio. Defendant Ware had been by coercion, duress, and threats of mob violence forced to destroy this, his own witness.

It is submitted that the convictions of these defendants are a nullity because they were obtained in violation of their Constitutional Rights and the privilege given both of them by the Fifth and Fourteenth Amendments to the Constitution of the United States. It is at open war with Due Process.

To allow these convictions to stand would approve and legalize a system of procedure by Prosecuting Officers to entrap and hold inquisitions with consequences for accused persons and for administration of criminal justice not tolerable under our Constitution. Other Governments do, but we must not. Other Governments do, we can not.

We invite the Court's attention to the case of *Malinski* v. *The State of New York* cited above.

Mr. Justice Frankfurter in his concurring opinion in this case so aptly and perfectly covers the point at issue in the case of these defendants, and sets forth so forcibly what is in our mind that we beg the indulgence of the Court to quote as follows:

> "To come concretely to the present case, the question is not whether the record permits a finding, by a tenuous process of psychological assumptions and reasoning that Malinski by means of a confession was forced to self-incrimination in defiance of the Fifth Amendment. The exact question is whether the criminal proceedings which resulted in his conviction deprived him of the due process of law by which he was constitutionally entitled "to have his guilt determined. Judicial review of that guaranty of the Fourteenth Amendment imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses. These standards of justice are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia."

Even Mr. Chief Justice Stone in the dissenting opinion in the *Malinski* case agrees with the position, on this question involved here, of Mr. Justice Frankfurter and the opinion of the Court. He says, Page 799:

> "We agree that the controlling principles upon which this Court reviews on constitutional grounds a state court conviction for crime, are as stated in the opinion of Mr. Justice Frankfurter."

We say here in our case at bar, as Mr. Justice Frankfurter said in the case of *Malinski*, that the proceedings of

the Prosecution, the Officers of the Sheriff, coercion in the "confession chamber," the details transpiring with Ashcraft in the "confession chamber" over a period of thirty hours, quoting Mr. Justice Frankfurter:

> "All these in combination are so below the standards by which the criminal law, especially in a capital case, should be enforced as to fall short of due process of law."

May It Please the Court:

We give importance to the questions discussed in the above quotation for the reason that they bear so powerfully and directly on this case of these defendants.

We say this for the reason that it was the adroit position of the Prosecution and it will likely be one of the contentions here that they did not introduce any admissions of Ashcraft that were incriminatory.

The record in this case does not support this contention or the position of the State. For all practical purposes the Prosecuting Attorney may as well have introduced and read to the jury the written instrument purported to be the confession of Ashcraft. The Jury may as well have been told in plain language that Ashcraft had confessed. We find in the record the following testimony:

State Witness—Waldauer:

> "Q. When you got in this room where the defendant Ashcraft was, with Dr. McQuistion, I will ask you to state to the jury whether Dr. McQuiston and the defendant Ashcraft had a conversation? I don't want you to tell what the conversation was, but did they have a conversation?
>
> A. Yes, sir. There were some others in the room that I omitted to name. At that time there was in the room Mr. Becker, Mr. Ezell, Mr. Battle, Mr. Joiner, Dr. McQuistion and myself.

Q. After this conversation took place there between Dr. McQuiston and the defendant Ashcraft, state to the jury whether any examination was made by Dr. McQuiston of Mr. Ashcraft?

A. Yes, sir, there was.

Q. Do you remember whether his clothes were taken off and whether Dr. McQuiston examined him there?

A. Yes, sir, he did.

General Gerber: You may take the witness.

Mr. Bickers: I want to renew my motion that the Court delete any reference to the defendant E. E. Ashcraft from the statement that this witness made and any reference to him in that room.

The Court: Overruled.

Mr. Bickers: Exception. No questions." Record Pages 142-143.

DR. J. A. MCQUISTON testified as follows:

"Q. After you got to this building where did you go?

A. To an office on the 5th floor.

Q. State to the Jury if at that time on the 5th floor of this building you saw the defendant Ware?

A. I did.

Q. What was done up there at that time, doctor?

A. The supposed confession was read to John Ware and he was requested to sign the confession. After it appeared that he couldn't write his name, he was assisted in making his mark by Mr. Waldauer, who took his acknowledgment.

"Q. I will ask you whether that confession or statement was read back to John Ware in your presence?

A. It was.

Q. Did you have a copy of it at that time?

A. Yes, I had a copy of it.

Q. After the statement was read back to Ware and was executed in your presence by Mr. Waldauer, I will ask you if you made any examination of the body of Ware at that time?

A. I did.

Q. State to the jury whether that examination showed any signs that anybody had beaten or struck him?

A. There was no indication of such.

Q. Did you ask him how he had been treated?

A. I did and his answer was that he was treated all right.

Q. After you made this examination of Ware I will ask you if you went to where E. E. Asheraft was?

A. I did.

Q. State to the jury whether at that time you had a conversation with the defendant Asheraft?

A. Yes, sir, a limited conversation.

Q. I don't want you to state what he said, but you did have a conversation with him?

A. Yes, sir.

Q. What was his condition at that time, referring to fatigue?

A. He appeared normal.

Q. Were his eyes bloodshot?

A. No, sir.

Q. Was any complaint made to you by Mr. Asheraft as to any mistreatment of any kind?

A. No, sir.

Q. After you had this conversation with him, was he disrobed and did you examine him?

A. Yes.

Q. Did you find any marks of violence or evidence that he had been struck by anybody?

A. No, I did not." Record Pages 145-146.

State Witness Becker testified more fully to the same effect. Becker also testified that he had Dr. McQuiston called in for these physical examinations because he was afraid that these defendants might claim that they were beaten up and these confessions secured as a result of physical violence.

The Court will see from this testimony that the Jury was virtually and in effect told that Asheraft had actually

confessed his guilt. The inference and implication is perfectly apparent. It did not take a smart jury to draw this conclusion. This Jury evidently did and found him guilty.

The State contends that all this testimony against Ashcraft does not incriminate him and is therefore harmless. We say that this testimony presents an adroit and subtle effort to convict Ashcraft by circumventing the holding of this Honorable Court in its opinion and in violation of both the letter and spirit of it.

This procedure on the part of the State of Tennessee does not measure up to, but falls ignobly short of due process of law. The State has attempted to do indirectly what it has been prohibited from doing directly by the opinion of this Honorable Court.

They introduced before the Jury all of the details of conversations, quizzings, and what transpired in the "confession chamber" with Ashcraft up until Monday morning when Ware's alleged confession was presented to him, and he admitted, as is claimed, it was true. There the State stopped.

Coercive proceedings of thirty hours or more are detailed in this record. These proceedings were embodied in the written instrument and detailed in the former record considered by this Court and ruled illegal in its opinion.

The details of what transpired in the "confession chamber" with Ashcraft over the 30-hour period, testified to by the Officers, as evidence, whatever it might be called "circumstantial" or what-not, was illegally secured through coercion and intimidation so held by this Court and he cannot be convicted upon it. Mr. Justice Rutledge so ruled in his concurring opinion in the *Malinski* case when he said:

> "Whatever may be the rule as to the use of evidence secured by means merely unlawful, in my judgment the

Constitution does not tolerate the use of evidence obtained by unconstitutional methods, including coercive ones, to bring about a conviction for crime which is constitutional. The Constitution does not thus nullify its own terms, setting them at war with each other."

We say that the evidence upon which Ashcraft is convicted,—however it may be designated, if it can be called evidence at all was secured by unconstitutional methods including coercion and it has been so held by this Honorable Court in its opinion in this case.

We have before stated that the office of the Public Defender was created in 1917 by the Legislature of the State of Tennessee for the purpose, among others, of abolishing "Third Degree Methods" and Inquisitions in Shelby County. It has not met with any great success and the glaring reason is reflected by this record. He is never called, doesn't know what's going on until the Prosecution and the Officers have accomplished their foul purposes of securing confessions. Then it is too late,—just as in this case.

A favorable ruling from this Court in this case will end this unconstitutional practice for Shelby County at least, because the Public Defender, a Public Officer sworn to support the Constitution, will be called in, as he should always be, in behalf of poor, helpless suspects on proceedings of the character reflected by this record.

The writer, who was Public Defender for Shelby County for twenty years, brought to this Court in the year 1922 or 1923 a similar case, the case of *Charles Barr* v. *The State of Tennessee*. He was repelled. At that time the spark of life in the Fourteenth Amendment to the Constitution of the United States had not flamed. It came in the case of *Chambers* v. *Florida*. Even though we were repelled in the case of Charles Barr we had an abiding faith in the

potency and the power of the Due Process Clause of the Fourteenth Amendment.

We invoke its power again in this case on the record now presented to this Court.

Authorities of some known foreign governments might or would have shot these victims at sunrise on Monday morning, June 16th, after this ordeal.

Our Prosecuting Authorities did not on that Monday morning, when Court convened, go before the Judge, call for an indictment, request the empanelment of a Jury of 12 other businessmen, relate to them "just what happened up there" in the "confession chamber", have Dr. McQuiston tell them that he, up there, after careful examination found both of these men mentally sane and physically fit, and insist that the Jury write a death warrant in accordance with their insistence and recommendation and get the whole thing over with at once.

So far as the State's case is concerned, they were fully prepared, had all the evidence available or that has ever existed against them. It all came from these defendants, from their own lips in the "confession chamber" in the nature of coerced statements, conversations, incriminations, and alleged confessions.

Two reasons suggest themselves as to why the Prosecuting Authorities did not do this or at once follow this procedure. One is, that the Prosecuting Authorities and Officers, according to their own testimony, were physically exhausted and needed rest and recuperation. However, it might be noted just here, that Dr. McQuiston, and Businessmen Castles and Pidgeon in the other record, testified that Ashcraft and Ware were both bright and fresh physically at the end of this long session or ordeal. The other reason, which suggests itself, is the fear on the part of the Authorities of public condemnation or for a show of common decency.

However, after a time the Judge of the Criminal Court empaneled a Jury and the Prosecuting Attorney recommended and insisted that the Jury write a death verdict for these defendants. He told them that he and his aides and the Sheriff's Officers had had a long physically exhausting session with these defendants on the fifth floor of the Shelby County Jail, a "confession chamber", day and night, lasting continuously from 7:00 o'clock Saturday night, June 14th, until 9:00 or 10:00 o'clock, Monday morning, June 16th, and that although the work of this session was so exhausting that the men had to work in relays, securing rest, sleep and food between sessions, that these men, the defendants, finally, freely, and voluntarily incriminated themselves and confessed their guilt.

He allowed his Representatives and other Officers to relate to the Jury the details of this story from the witness stand and had Dr. McQuiston tell the Jury that the Prosecuting Attorney and Officers called him and had had these men stripped nude for examination on the early morning of Monday, June 16th, and that he found them fresh and fit physically.

The Jury followed the recommendations and the insistence of the Prosecuting Attorney, but instead of writing a death warrant for these defendants, wrote a verdict, carrying with it a sentence of life imprisonment in the Tennessee State Penitentiary.

This is a fair, not an overdrawn picture of the case.

The Trial Judge of the Court approved.

The Trial Judge allowed no interferences with these proceedings on the part of the Prosecuting Attorney while presenting these matters and this story to the Jury.

It is significant, in the record here, that not one objection of consequence made and entered on behalf of either of these defendants was sustained by the Trial Judge either

as to the manner of procedure or as to the introduction of evidence.

Now, we see very little difference in the procedure of conviction by the Authorities of some foreign governments and the procedure of conviction followed here by our Prosecuting Authorities in this case involving these defendants. We condemn it. The Constitution of the United States condemns it. All Courts constituted, as our Courts are, ought to condemn it, and we cite as our authority the holding of the Highest Court of our Land and the Greatest Court in the World.

Ashcraft v. *Tennessee*, 322 U. S. 143, 155, 64 S. Ct. 921, 927, 88 L. Ed. 192.

There the Court says:

> "It is inconceivable that any Court of Justice in the land, constituted as our Courts are, open to the public, would permit Prosecutors serving in relays to keep a defendant witness under continuous cross-examination for 36 hours without rest or sleep in an effort to extract a 'voluntary' confession."

In addition we have what we know as and designate A Civil Liberties Statute in our Criminal Code of the United States.

The basis of the lawsuit upon which the defendant Ashcraft stands convicted finds its purported authority advanced by the State that the defendant, E. E. Ashcraft, after 28 hours of Third Degree Tactics employed against him in the "confession chamber" said to his inquisitors "a negro killed my wife". The legality and legitimacy of this so-called testimony has been unequivocally passed upon by this Court in the following language in its opinion in the instant case:

> "As to whether Ashcraft actually confessed there is a similar conflict of testimony. Ashcraft maintains

that although the officers incessantly attempted by various tactics of intimidation to entrap him into a confession, not once did he admit knowledge concerning or participation in the crime. And he specifically denies the officers' statements that he accused Ware of the crime, insisting that in response to their questions he merely gave them the name of Ware as one of several men who occasionally had ridden with him to work. The officers' version of what happened, however, is that about 11 P. M. on Sunday night, after twenty-eight hours' constant questioning, Ashcraft made a statement that Ware had overpowered him at his home and abducted the deceased, and was probably the killer."

Counsel for Defendant Ashcraft attempted to read the above excerpt from the opinion of this Court to the Trial Court when this question arose but was denied that privilege at the trial.

In the case of *Ward* v. *The State of Texas*, 316 U. S. 547 this Honorable Court said:

"This Court has set aside convictions based upon confessions extorted from ignorant persons who have been subjected to persistent and protracted questioning, or who have been threatened with mob violence, or who have been unlawfully held incommunicado without advice of friends or counsel, or who have been taken at night to lonely and isolated places for questioning. Any one of these grounds would be sufficient cause for reversal. All of them are to be found in this case.

"The use of a confession obtained under such circumstances is a denial of due process and the judgment of conviction must be reversed.

"Reversed."

The holding of this Court set out in the quoted excerpt covers our case at Bar.

Conclusion

Your Petitioners therefore respectfully pray that this their petition for writ of certiorari be granted and issued to the Supreme Court of the State of Tennessee to bring this cause before this Honorable Court and the record in the cause to the end that this Honorable Court might consider the issues raised in said petition and errors assigned, and that upon consideration by this Honorable Court their constitutional rights preserved, the mandate of this Court sustained, and their case reversed and dismissed.

If the Court deems necessary oral argument, we are ready.

This is the first application for a writ of certiorari in this particular case.

Respectfully submitted,

Jas. F. Bickers,
Attorney for E. E. Ashcraft.
Grover N. McCormick.
Attorney for John Ware.

EXHIBIT "D"

IN THE SUPREME COURT OF TENNESSEE

No. —

STATE OF TENNESSEE

vs.

E. E. ASHCRAFT and JOHN WARE, *Defendants*

MOTION OF THE DEFENDANTS IN THIS CASE UPON THE OPINION OF, AND THE PROCEDENDO FROM, THE SUPREME COURT OF THE UNITED STATES, AND UPON THE ADMISSIONS, RECOMMENDATIONS AND REQUESTS OF THE ATTORNEY GENERAL OF TENNESSEE, BOTH IN BRIEFS FILED AND IN ORAL ARGUMENT IN THE SUPREME COURT OF THE UNITED STATES, TO DISMISS THEIR CASES AND ENTER A JUDGMENT IN THEIR BEHALF, RELEASING THEM UPON PROPER ORDER, OR, IN THE ALTERNATIVE, REVERSE AND REMAND THEIR CASES TO THE JUDGE OF THE FIRST DIVISION OF THE CRIMINAL COURT OF SHELBY COUNTY, TENNESSEE, WITH DIRECTIONS TO ENTER A VERDICT OF NOT GUILTY OR DISMISSAL AND THEN RELEASE.

MAY IT PLEASE THE COURT:

Come now the defendants and file this, their motion in this Court embodied in the above caption (but not quoted again), and in support of their motion say:

They stood convicted solely and alone in this Court upon their alleged confessions. This has been conceded all along.

It was conceded in argument in the Supreme Court of the United States by the learned Attorney General of the State of Tennessee, that their convictions could not be sustained, without the said confessions. (See opinions Supreme Court of the United States, Page One.)

With the confessions out of the record, there is not a line of testimony even connecting the defendants with the crime, and all of the evidence with the confessions out of the record, conclusively establishes the innocence of the defendants. This is the concession of the Attorney General of Tennessee.

The alleged confessions are out of the record, very definitely and certainly as to Ashcraft.

This is the holding of the Supreme Court of the United States.

Upon the record therefore, Ashcraft stands innocent before this Court.

Now as to Ware, the learned Attorney General of the State of Tennessee, in all briefs filed, and in oral argument before the Supreme Court of the United States, has recommended and requested that if Ashcraft's case were reversed and he be discharged, then the same action should be taken as to Ware, and stated specifically that the State of Tennessee rebels at the thought of letting the greater criminal escape, while the lesser pays the penalty imposed by law.

In the light of these recommendations and requests by the Attorney General of the State of Tennessee, the Supreme Court of the United States, in its opinion, saw fit to vacate the judgment as to Ware, and send this case back to this Honorable Court to carry out the recommendations and the request of the Highest Prosecuting Officer of the State of Tennessee, the Attorney General.

In effect the request and recommendation of the Attorney General, is that the case of Ware be dismissed, and he be discharged.

From the opinion of the Supreme Court of the United States, and the recommendations and requests of the Attorney General, this is the only conclusion that can be drawn.

These defendants, therefore, move that their cases be dismissed, and that a verdict of not guilty be entered by this Honorable Court, and their discharge ordered.

This Honorable Court will then further consider this case and this motion, in the light of the opinion of the Supreme Court of the United States, with the alleged confessions cut out of the record.

This Honorable Court from its inception, has on appeal reversed and dismissed, in both civil and criminal cases, where under the record, fundamental justice merited and called for this procedure.

This Honorable Court has followed this procedure under the Constitution of the State of Tennessee, the Common Law, and the Statutes of our State. This is the General Law.

See Wharton's Criminal Procedure, Vol. III, Tenth Edition, Page 2155.

There it is stated as follows:

> "The whole of a sentence may be reversed for an error in part, or a sentence, if divisible, may be affirmed in part, and reversed in part. BUT WHERE THE CASE IS ONE ON WHICH NO CONVICTION COULD, OR ON ANY CONTINGENCIES, BE SUSTAINED, THE APPELLATE COURT WILL REVERSE ABSOLUTELY, AND ORDER THE DEFENDANT TO BE DISCHARGED." (Caps ours.)

These defendants submit that this is sound, general law, and that it fits their case, upon this record, in the light of the opinion of the Supreme Court of the United States, and in the light of the concessions, admissions and requests of the Attorney General of the State of Tennessee.

We invite the Court's attention to Michies' Digest APPEAL AND ERROR, Page 730, Sections 446, 447 and 453.

This Court has consistently reversed absolutely in proper cases, where simple judgment demanded, and entered on several such final judgment as the lower court should have entered.

It has done so since the opinion of the old case Swartz Sword, State 24, Tenn. P. 101, to the present time. Especially is this true in criminal cases.

> THIS COURT HAS UNIVERSALLY FOLLOWED THIS PROCEDURE AND TAKEN THIS ACTION, IN BOTH CRIMINAL CIVIL CASES, WHERE A MOTION FOR A PEREMPTORY INSTRUCTION HAD BEEN MADE AND ERRONEOUSLY ACTED UPON, BY THE TRIAL COURT.

The opinions of this Court, in support of this proposition, are too numerous for citation.

We do not think that this proposition of law will, or could be, questioned.

Now what happened in the lower court in respect to these defendants at the close of all of the proof, as well as at the close of the State's Case?

A motion was made in behalf of both of these defendants:

I. That the confessions and all testimony appertaining thereto, be stricken from the record as incompetent and inadmissible.

II. That the case be dismissed, and a verdict of not guilty be entered in their behalf, and that the Court peremptorily so instruct the jury.

These motions were overruled by the Court and proper exceptions taken.

The rights of these defendants were preserved in their motions for a new trial for Ware; grounds VIII, IX, XIV. For Ashcraft, VI, VII, VIII.

The rights of these defendants in this regard were further preserved in this Court by proper assignments of error, which this Court, on this motion, is asked to further consider in the light of the opinion of the Supreme Court of the United States, and the admissions, concessions and requests of the Attorney General of the State of Tennessee.

It is submitted that this Court should now enter a final judgment in behalf of these defendants, releasing them, entering here the judgment that the lower court should have entered upon the original motion for a peremptory instruction in their behalf.

It is now obvious that the trial court should have granted the motions of these defendants, in the light of the opinion of the Supreme Court of the United States.

So far as our investigation goes, this Honorable Court has never deviated from this procedure. It has always taken final and determinative action in such cases.

The confessions are out of this record, and there is nothing left but testimony without contradiction, establishing their innocence.

It is submitted therefore, that this Court should finally end this litigation, and by its order, dismiss and discharge these defendants.

There is no ground or legal reason for a remand.

However, if this Honorable Court should conclude that it is a proper or preferable procedure to reverse and remand, they ask that the Court do so, with instructions to the Judge of the First Division of the Criminal Court, of Shelby County, Tennessee, to dismiss, or enter a verdict of not guilty and release them.

They submit that their case should not be, by this Court reversed and remanded for a new trial.

They have suffered the ordeal of two long, drawn out trials of their cases. They were tried and convicted before Judge Wallace, now deceased, who was then Judge of the First Division of the Criminal Court, of Shelby County, Tennessee.

At this trial they were convicted solely and alone upon their alleged confessions, just as they were at the second trial. At their first trial, the State went to great length in submitting to the jury every piece of available testimony touching upon the issue of the case.

The record of the first trial was before this Honorable Court, occasioned by the death of Judge Wallace, who had never signed the Bill of Exceptions. This Honorable Court must have observed in this record that their convictions stood alone and solely, upon their alleged confessions.

Thereupon, it became necessary to try these defendants again. The Court will see from this record, which is the record of the second hearing, that the State used every available witness who knew anything about the facts in the case. The State put on all possible testimony that it had, not only upon the first trial, but upon the second, the record of which we are now considering.

So that we most earnestly insist that this Honorable Court should not put them through a third trial, when obviously there is no other testimony upon which they could possibly be convicted with their confessions out of the record, and declared invalid and inadmissible by the Supreme Court of the United States.

Simple justice warrants the dismissal of their cases by this Honorable Court.

They therefore ask that this motion be sustained, and their discharge ordered by proper order.

Respectfully submitted,

JAMES F. BICKERS,
GROVER N. MCCORMICK,
Attorneys for Defendants

A copy of this motion has been sent to General Nat Tipton, and General Will Gerber.

EXHIBIT "E"

IN THE SUPREME COURT OF TENNESSEE

No. ——

STATE OF TENNESSEE

vs.

E. E. ASHCRAFT and JOHN WARE, *Defendants*

ANSWER OF WILLIAM GERBER, DISTRICT ATTORNEY GENERAL FIFTEENTH JUDICIAL CIRCUIT OF TENNESSEE, TO MOTION OF DEFENDANTS TO DISMISS THEIR CASES, OR, IN THE ALTERNATIVE, TO REVERSE AND REMAND THEIR CASES WITH INSTRUCTIONS TO TRIAL JUDGE TO ENTER A VERDICT OF NOT GUILTY.

MAY IT PLEASE THE COURT:

Now comes your Relator, William Gerber, the duly elected, qualified and acting District Attorney General for the Fifteenth Judicial Circuit of the State of Tennessee and in answer to the Petition of the Defendants heretofore filed says:

The Respondent admits that the Supreme Court of the United States in an opinion previously delivered in the

aforestyled cause has ordered the exclusion of the confession of the defendant, Ashcraft, and has remanded the case against the defendant, Ware, for further consideration in accordance with said opinion.

The Respondent most emphatically denies that a conviction cannot be sustained against the defendant, Ashcraft, without his confession, which was made shortly after the commission of this atrocious crime.

On the contrary, we submit to this Honorable Court that there is ample and sufficient proof available at this time without the use of the confession of Ashcraft to warrant a conviction of Murder in The First Degree as to both the defendants, Ashcraft and Ware.

The Respondent urges upon this Honorable Court the positive and unequivocal contention that the proof now available will show that the defendant, Ashcraft, was the prime mover in the killing of Zelma Ida Ashcraft and that he hired and counseled the defendant, Ware, to actually do the killing.

The Respondent is of the opinion that upon the available proof the guilt of these two defendants can be established beyond a reasonable doubt, to a moral certainty and to the exclusion of every other reasonable hypothesis.

The Respondent, therefore, insists that there is no merit in any of the allegations raised by the defendant's Petition, urges that said Petition be dismissed, and that both defendants be ordered retried jointly.

Respectfully submitted,

WILLIAM GERBER,
District Attorney General, Fifteenth Judicial Circuit, State of Tennessee.

IN THE SUPREME COURT OF TENNESSEE AT NASHVILLE

No. —

SHELBY CRIMINAL

E. E. ASHCRAFT and JOHN WARE

v.

STATE OF TENNESSEE

MOTION TO REMAND AND BRIEF OPPOSING MOTION TO DISMISS

MAY IT PLEASE THE COURT:

Now comes the State of Tennessee and moves the Court that conformably to the mandate of the Supreme Court of the United States this date filed in the office of the Clerk of this Court that the causes in question be remanded to the Criminal Court of Shelby County for such further proceeding as that court may take thereon.

As is known to the Court, the judgment of the Criminal Court of Shelby County against plaintiffs in error, later affirmed by this Court, was reversed by the Supreme Court of the United States for further proceedings. The normal procedure in such cases is for this Court to remand the causes to the trial court and the state respectfully insists that such procedure be followed in the present case.

Opposing the motion of the plaintiffs in error that this Court enter an order of dismissal in each of the above styled causes, the state would respectfully show that such action on the part of this Court would constitute the exercise of original jurisdiction prohibited by the organic law in this jurisdiction. After all, the sufficiency of the evidence against the plaintiff in error Ashcraft with his confession elided as required by the judgment of the Supreme Court of the United States, is a question which should be passed upon in the first instance by a trial jury. The District Attorney General to whom responsibility has been confided

by law for the prosecution has filed in this Court a brief opposing the dismissal of these cases and insisting that in his opinion the evidence warrants another trial. That responsibility which the law has placed upon him should not be assumed by this Court but upon the contrary, the normal procedure in such cases should be followed.

The primary thought of the motion seems to be that the trial court in the second trial erroneously overruled the motion for a directed verdict and that this Court should now sustain such motion and direct a verdict in favor of the plaintiff in error Asheraft. This contention loses sight of the fact that this Court has never recognized the propriety of directing a verdict in criminal cases but on the contrary, has expressed its disapproval thereof. Knowling v. State, 176 Tenn., 56.

So far as Ware be concerned, while the representatives of the state did insist that his conviction be reversed in case that of Asheraft was, the Supreme Court of the United States did not hold inadmissible his confession but directly avoided a decision upon that point although definitely challenged by the minority opinion to do so. However, as stated by the representatives of the state, it is desirable that the case proceed jointly against both the plaintiffs in error and for this reason, the representatives of the state request that the judgment of this Court against plaintiff in error Ware be remanded also to the Criminal Court of Shelby County for purposes of trial.

For the reasons stated, the state respectfully insists that the motion of the plaintiffs in error to dismiss the prosecutions against them in this Court should be denied and that the causes against plaintiffs in error should be remanded to the Criminal Court of Shelby County for further proceedings.

Respectfully submitted,

NAT TIPTON,
Assistant Attorney General.

NT:ME 6/19/44.

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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 381

E. E. ASHCRAFT AND JOHN WARE,
Petitioners,

vs.

STATE OF TENNESSEE,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

BRIEF OPPOSING ISSUANCE OF WRIT

NAT TIPTON,
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Supreme Court Bldg.,
Nashville, Tennessee,
Attorney for Respondent.

ROY H. BEELER,
Attorney General of Tennessee,
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Nashville, Tennessee,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

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STATE OF TENNESSEE,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

BRIEF OPPOSING ISSUANCE OF WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

Foreword

Counsel for the petitioners have made application for the issuance of the writ in forma pauperis and upon the typewritten record and have not furnished counsel for the respondent copy of such record. For this reason, references to the pages of the typewritten transcript can only be approximate.

In

Statement of the Case

The petition seeks the issuance of the writ for the purpose of reviewing a judgment of the Supreme Court of Tennessee affirming the conviction of petitioner John Ware as principal and that of petitioner Ashcraft as accessory before the fact for the murder of Mrs. Zelma Ashcraft on June 5, 1941.

The respondent had hoped that it would not be necessary to burden the Court with a discussion of the facts upon which the conviction rests; but since counsel for petitioners have made the assertion that the only testimony upon which the conviction may rest was extorted by means hardly in accord with the concept of due process; and since this Court has intimated upon several occasions that due process requires that the evidence supporting a conviction in a criminal case shall be of a substantial nature, it becomes necessary to review the facts upon which the conviction rests, to demonstrate the utter and erroneous nature of the claims of the petitioners. No doubt the petitioners have taken note of the principle so prevalent recently in psychological warfare that a distortion if repeated with sufficient frequency will induce the belief in the truth of such distorsion and have sought by a repetition of horrendous statements to convince this Court of the truth thereof.

The facts in the case concisely stated are as follows:

The deceased was the wife of the petitioner Ashcraft. The record discloses that sometime prior to her death, which occurred on the morning of June 5, 1941, Mrs. Ashcraft had been operated on to the extent of removing her Fallopian tubes and the major portion of her ovaries. The medical testimony leaves no doubt that this operation had made her extremely nervous and there is testimony in the record that at times she became almost hysterical. There is likewise evidence in the record reflecting seriously upon

her ability to consummate the marital relation. It is likewise inferable from the record that her religious faith prohibited a divorce on other than scriptural grounds.

Deceased and petitioner had accumulated some property. The record indicates that they owned as tenants by the entirety real estate assessed at $1700.00, that Mrs. Ashcraft had an insurance policy upon her life in the sum of $1,000.00, that contained a double indemnity provision in case of accidental death and that the petitioner Ashcraft was the beneficiary therein. The record indicates that the couple had approximately $3600.00 in savings and commercial accounts in a bank in Memphis, of which the sum of $1600.00 had been deposited on May 31 preceding the death of deceased. These were joint bank accounts and in case of the death of the deceased, the petitioner would take the entire sum as joint survivor.

The operations which Mrs. Ashcraft had undergone seem to have addicted her somewhat to the use of amytal which the record shows is a hypnotic or sedative.

The petitioner Ashcraft is a mature white man who was operating a steam shovel or dragline at the time of these happenings. The record leaves no doubt but that steady nerves are an essential to this occupation. John Ware, the other petitioner, is a young negro who does not appear in the record to be vicious in the slightest degree. He had worked upon these construction jobs with Ashcraft and was well acquainted with the latter. His home lay approximately a mile from the home of Ashcraft and between Ashcraft's home and some of the construction jobs upon which both had been employed.

The deceased intended to leave her home in Memphis on the early morning of June 5, 1941, for an extended visit to her mother in Kentucky. She planned to make the trip in an automobile owned by the couple. So far as the record discloses, there were seven persons who were aware that

the deceased contemplated making this trip. These are Mrs. Gambreal, a neighbor; four young ladies who were student nurses and were at her home on the night before the trip; Cora Taylor, the negro maid of deceased, and the petitioner Ashcraft. Of these it may be said in passing that Mrs. Gambreal and the four student nurses seem to be above suspicion. Cora Taylor and her connections were completely investigated by the law enforcement officers of Shelby County and found to have been above suspicion and in addition thereto, so far as this record goes, the petitioner Ashcraft was the only one of the seven who was acquainted with Ware, a fact that becomes most material if Ware was the actual slayer, as the state insists.

The deceased planned to leave her home in the neighborhood of 3:00 A. M. upon this morning in order to make the trip as speedily as possible. No person in this record seems to have seen her leave, with the exception of the petitioner Ashcraft.

About 4:00 P. M. on this same afternoon attention was attracted to an automobile which had been parked on a road between Memphis and Raleigh and which had been sitting at that point virtually all day. The Sheriff's Patrol Cars were notified and Mr. Matteer, a Deputy Sheriff, came to this point and began to investigate. Shortly after he reached this automobile, his attention was directed to an object floating in a slough nearby and procuring a boat he went to the object and found it to be the body of deceased. Identification was accomplished by means of her driver's license found near this automobile.

When found the body had four rather severe wounds in the head made, according to the medical testimony, by some rugged object. A number of rocks were at the place where the body was found and undoubtedly rocks of this nature were the objects used in inflicting the death wound. The body of deceased was fully clad. The deceased's dress was

buttoned up to the top and, in addition, a gold breast pin at the top of her dress was still intact and pinned. Although the medical testimony is to the effect that these wounds were of a nature that would not only bleed frequently but would spurt, no blood was found on the dress. The medical testimony as to the nature of these wounds bleeding frequently is further confirmed by the fact that after the body was removed to an undertaking establishment and there placed upon the table, they began to bleed.

In the car there was found the pocketbook of the deceased, the contents having been scattered over the front seat and on the ground near the car so as to give the appearance of robbery. In the car was found a box of 12 amytal tablets, the same number purchased by the deceased on the previous night. Some other medicine was likewise found and there was found an empty crushed amytal box, the significance of which appears in connection with the chemical examination of a part of the tissues of deceased disclosing a large amount of amytal present in these tissues. On the next day, the bank books carried by deceased and a rosary of beads were found in the vicinity of this car. Despite, however, the fact that an attempt had been made to give the homicide the appearance of robbery, the suitcase of deceased which was in the back seat of the car apparently had not been opened because when investigated by the officers, its packing had not been disturbed.

A complete examination was made of the car, no trace of blood could be found in it, and a complete examination was made of the terrain surrounding this slough. No trace of blood or sign of a struggle of any kind could be found at this point. Later one of the investigating officers walked from the home of deceased over the route she would naturally take to the scene of the crime and no trace of blood or sign of struggle could be found along such route. However, one significant clue was revealed at the scene of

the robbery. Upon the left side of the front cushion of this automobile there appeared a muddy footprint. A preservative was sprayed over it and its shape thereby secured. The materiality of this becomes evident when we remember that later a pair of shoes, the property of Ware, was secured and later one of these shoes was found to fit completely in this track. Fingerprints from the car could not be obtained because the road where it was sitting was composed of gravel and the dust from this gravel had completely absorbed the moisture of such fingerprints and rendered impossible any definite procurement thereof.

After an investigation had thus been made at the scene of the crime the body was turned over to an undertaking establishment and the investigating officers proceeded to the address contained on this driver's license for the purpose of further investigating. Shortly after they reached that spot, the petitioner Ashcraft appeared. The testimony of the officers is to the effect that they informed him of the murder of his wife and that his first response was that it could not have been his wife because she had left to go to Kentucky early that morning. However, the officers testify that when he was so informed of the tragedy, he manifested no emotion, made no inquiry as to how she had met her death, as to the locality, and in short, from their testimony, the inference is that he seemed rather indifferent to it. However, at once he did inquire of the officers as to whether or not the deceased had been robbed and made the statement that the deceased had $50.00 in her purse and that in a small chamois bag pinned to an inner garment she had $200.00. The petitioner Ashcraft was taken to the undertaking establishment for the purpose of identifying the body and, according to those who were present, displayed no emotion nor made any inquiry other than to pat the lifeless form of deceased and to make the statements that she had been a good girl to him. At

that time her clothing was removed and this undergarment, to which the petitioner stated that the pouch had been pinned, was examined and no sign could be found that any such receptacle had ever been pinned therein. The testimony is definitely to the effect that no pinholes could be found in this garment.

Shortly thereafter the petitioner Ashcraft was taken to the police station and there interviewed by the authorities for the purpose of assisting them in the discovery of the criminal. No complaint is made as to this interview and evidently he was under no duress whatsoever. In this interview in substance, he made the statement that they had arisen about 3:00 A. M. and that he backed the car out of the garage and that deceased got in. He made the further statement that due to a leak in the hose connection, the car was slow to warm up and that deceased sat in the car until the miss in the engine ceased and that she then drove off and that he went back to bed, arose at his accustomed time, fixed his breakfast and went to work. He likewise made the statement that deceased complained of a headache upon this morning and that she took an amytal tablet and made the statement that if this did not relieve her head, she would take another tablet and a coca-cola somewhere along the route.

Following this interview with Ashcraft, the investigating officers used the automobile in question quite frequently but could find no evidence of any engine trouble in their use of it, which naturally threw suspicion upon Ashcraft. The nature of the facts surrounding the homicide was such as to throw doubt upon his suggestion that robbery had been the motive for the homicide and so the officers decided to further interrogate Ashcraft about the matter and point out to him the discrepancies in the story that he had given them. Accordingly on Saturday, June 14, about 7:00 to 7:30 P. M., they got Ashcraft, took him to the fifth floor

of the Shelby County Jail, and Mr. Becker in charge of homicide investigation, and Mr. Battle, an Assistant Attorney General, began to question him about the situation. During all this investigation, Ashcraft made no incriminating statement other than it is testified that about 11:00 upon this same night, he made the statement that he realized that a good many circumsances pointed toward him but that he was not guilty. The investigation continued for the remainder of that night and the next day and next night until approximately 11:00 P. M., on Sunday night, when Ashcraft made the statement to the officers that a negro had killed his wife, a negro by the name of John or Tom Ware. It might be stated parenthetically that this is the first time that the name of Ware had been brought into the case and it seems definite that the officers had no idea that Ware had any connection with the case until this disclosure of the statement by Ashcraft. Upon being informed that Ashcraft could not inform them as to where this negro lived but could show them, the officers took him in the car and under his direction, went to the home of Ware. The testimony is to the effect that this party left the jail about midnight on Sunday night. The record upon this trial does not reveal just how long it took the officers to go to Ware's home and return, but suffice it to say that they did go to the place where Ashcraft told them Ware lived, and after going in the wrong house first, they arrested Ware, put him in the car and returned to the jail. It may be well assumed by the Court that this took approximately an hour although the distance from the jail to Ware's home is not disclosed in the record, but the normal occurrences as detailed by the witness would necessarily entail some time and the state thinks it not an unreasonable inference to conclude that they reached the jail approximately about 1:00 A. M.

According to the state's testimony, Ware and Asheraft were both carried to the fifth floor of the jail and there Asheraft was confronted with Ware, and Ware asked the question as to whether or not he knew Asheraft. Ware replied that he did and then he was asked as to the date of the last time he had ridden with Asheraft in his car. According to the testimony of those who were present, Asheraft undertook to suggest an answer to Ware and thereupon Ware turned to the investigating officers and asked them if they desired the truth. Upon receiving an affirmative answer, their testimony is that he turned to Asheraft and said in substance that he had told him when this matter came up if they got into any trouble, he was not going to take all the blame. According to the State's officers who were present, this disclosure or admission on the part of Ware occurred within five minutes after he was carried to the fifth floor of the Shelby County Jail. Thereupon Ware made a complete confession of his participation in the crime, stating in substance that Asheraft had hired him to kill the deceased, that Asheraft had gone to his home and gotten him and carried him to the place of departure and that he waited a considerable time, and that finally Asheraft and the deceased came up and he told them it was a hold-up and that under his direction, the deceased drove the car to this spot where it was later found parked and that there he caused the deceased to get out of the car, that he took from her wrist, under Asheraft's direction, her wrist watch and that he gave it to Asheraft and shoved her in this slough. He testifies that the deceased began to scream and thereupon under Asheraft's direction, he struck her in the head with rocks.

At this point it should be noted that when the officers went to Asheraft's home on the day of the discovery of the body, they found this wrist watch in a chest of drawers. The testimony developed that the maid who had come to

clean the house on the day following the departure of the deceased, found this wrist watch lying upon a box and had placed it in this chest of drawers obviously for better protection and safekeeping. It should be stated here that a lady in the neighborhood who was awake about 3:00 A. M. on the morning of the homicide, heard two screams which she describes as being muffled and coming from the direction in which the body was found. The time of the advent of this car is fixed as between 2:30 P. M. upon this morning when one witness passed the scene and no car was parked there and 3:25 A. M. when a milkman passing saw this car parked at this spot. Another witness going to his home from his duties on one of the daily papers in Memphis also saw a man standing at the left side of this car and moving toward the rear as his car approached. This witness was unable to distinguish the color of the person in question.

After Ware had thus made this confession to the investigating officers, Mr. Waldauer, an experienced Court Reporter of complete integrity of the City of Memphis, was called to the jail. His notation showed that he was called at 1:40, arrived at the jail at 2:10 and at 2:15 began to take the confession of Ware. This time element is important in view of the contention on behalf of Ware that his confession was coerced. Mr. Waldauer testifies that he took every word that was uttered by any person present and that the notes on the confession were completed in 15 to 20 minutes and so, therefore, from Mr. Waldauer's testimony it is obvious that Ware's confession so far as the stenographic report thereof be concerned, was taken in not exceeding an hour and a half after he reached the jail. The transcription of the confession was completed at 5:40 A. M. upon this same morning and read to Ware in the presence of a number of persons. They all testify that Ware signed the confession freely, that no force of compulsion was used

upon him and, incidentally, Mr. Waldauer testifies that he inquired of Ware as to how he had been treated and was informed by the latter that he had been treated all right.

As bearing upon the guilt of Ware, the testimony shows that although Ware had been accustomed to working at his place of employment for from 7½ to 9 hours each day prior to the homicide, while he reported for work on the morning following the homicide he worked only two hours, saying that he was sick and then appeared for work no more for the following four days.

According to the officers, on Tuesday following Ware's confession early Monday morning, he was placed in a car by them and taken to his home. From that point the officers testify that Ware directed them to the home of Asheraft, and from that point carried them over the route traveled by him and pointed out to them the scene of the homicide and, with their assistance, to a large degree reenacted it.

Asheraft did not take the stand upon this trial. However, Ware testified and repudiated his confession, insisting that he had no part in the homicide of deceased, that he did not know where Asheraft lived and that he was compelled to go to the home of Asheraft by the officers, that he had no knowledge as to where it was but the officers took him there, and that he was coerced into such reenaction of the crime as was done by him. His testimony with reference to the making of the confession was that when he was arrested, the officers refused to inform him why he was being arrested and that he was handcuffed at his home and as he was going down the steps of his house he was struck a hard blow that almost knocked him down and that he had to be finally carried and placed in the car. His testimony is that when he was carried to the jail and confronted with Asheraft he only knew the latter was "Mr. Johnny" and that he had to be informed by the officers as to Asheraft's last name. He denies making the statement testi-

fied to by the officers with reference to his refusal to take the entire blame. He testifies that then after this he was taken to the second floor of the jail and placed in a padded cell which the record shows is located on that floor, and after remaining in that receptacle for some time he was taken out by two officers, both of whom testify and who told him that a mob was forming and that unless he confessed to the murder of deceased he would be turned over to that mob. He testifies that under this type of pressure he agreed to confess to anything rather than to permit a mob to get him.

In rebuttal, Becker, Ezell, General Battle and Jayroe, all of whom were present, testify definitely that the ptitioner, Ware, was not struck on leaving his home; that he was not taken off the fifth floor of the jail after he was brought there with Ashcraft until the next morning and following his arraignment before a magistrate, and that no one put him in the padded cell nor threatened him with mob violence. Incidentally, it might be mentioned in passing that an examination of the body of deceased disclosed that she had not been criminally assaulted.

BRIEF

I

The Fourteenth Amendment does not bring to the test of decision of the Supreme Court every ruling made by a state court in the course of a criminal trial therein.

Avery v. *Alabama*, 308 U. S. 444;
Buchalter v. *New York*, 319 U. S. 427.

II

The construction by the court of last resort of any state of its own mandate presents no question properly reviewable by this Court.

III

The former opinion of this Court in this case contained no direction to dismiss further prosecution but merely held inadmissible the confession of Asheraft, reversed the case as to him for this reason, and vacated the judgment of the Supreme Court of Tennessee as to Ware for further consideration in the light of the holding of this Court with reference to the conviction of Asheraft.

IV

Separate trials are allowable under Tennessee procedure only where prejudice will result from a denial thereof.

Woodruff v. *State*, 164 Tenn. 530;
Kennon v. *State*, 181 Tenn. 415.

The sole ground alleged as prejudicial is that upon a joint trial the confession of Ware could be introduced. Since Asheraft stands convicted of being an accessory before the fact to the crime of murder, the confession of the principal

is admissible upon a separate trial as showing the guilt of such principal.

Givens v. *State*, 103 Tenn. 648;
Hale v. *U. S.* (C. C. A. 8th Cir.), 25 Fed. (2) 430;
Wigmore on Evidence, Third Ed., Sec. 1079.

V

The confession of Ware was not procured by unlawful means.

Lyons v. *Oklahoma*, 322 U. S. 596;
Woods v. *U. S.* (Court of Appeals, D. C.), 128 Fed. 265.

VI

No violation of Ashcraft's constitutional rights was committed by the introduction of the statements made by him during his examination.

(a) He made no statement therein admitting his guilt or properly constituting a link in the chain of circumstances against him.

(b) The weight of authority is to the effect that exculpatory statements need not be shown to be voluntary.

(c) His counsel conceded that the statements in question did not prejudice Ashcraft (Tr. pp. 158-9).

(d) No circumstance evolved by such questioning was relied on in the Supreme Court of Tennessee nor in this Court in aid of conviction.

(e) Since Ware was insisting that he was forced into a confession by his arrest about midnight, it was permissible to show that Ashcraft had accused him of the homicide, thus justifying his arrest.

VII

A claim of fundamental unfairness in the trial in a state court must be sustained, not as a matter of speculation but as a demonstrable reality.

Adams v. *U. S.*, 317 U. S. 269;
Buchalter v. *N. Y., supra.*

VIII

An immediate arraignment under the circumstances was not required of the arresting officers.

Wynn v. *State*, 181 Tenn. 325;
State v. *Nat. Surety Co.*, 162 Tenn. 547.

IX

Reading of reported cases to a jury in argument generally lies within the discretion of the trial court.

Note to 77 A. L. R. 656.

The rule in Tennessee is the same.

Swithson v. *State*, 127 Tenn. 357;
Davis v. *State*, 161 Tenn. 23.

As directly in point see *People* v. *Paisley*, 299 Ill., 576, 132 N. E. 822. Besides, the court merely declined to allow counsel to read the facts contained in the opinion of this Court upon the former appeal and did not restrict them in the presentation of the law contained therein (Tr. pp. 369, 370, 372).

Argument

The respondent regrets that counsel for petitioners saw fit to ignore the admonition of this Court in *Avery* v. *Alabama, supra,* and in *Buchalter* v. *N. Y., supra,* to the effect that not evey alleged error committed in the trial of a case in the Supreme Court is reviewable here by virtue of the

Fourteenth Amendment. Upon the contrary, they have sought to proceed in this Court as though a review by it is a matter of right and comprehends every alleged erroneous ruling made in the state courts. The respondent respectfully insists that such is not the case and that this Court examines proceedings in the state courts only with the view to determining whether or not therein there existed that essential unfairness repugnant to the accepted concepts of justice prevalent in the English speaking world.

Betts v. *Brady*, 316 U. S. 455;

See also Opinion Frankfurter, J. in *Malinski* v. *People of N. Y.*, 325 U. S. —, 89 L. ed. 738.

However, as above noted, since counsel reiterate the contention that the petitioners were convicted solely and alone upon testimony extorted from them by methods foreign to such concepts of justice, the respondent has no alternative other than to discuss in detail circumstances relied upon by the prosecution and to show that they justified the verdict of the jury in the lower court and its subsequent affirmance by the Supreme Court of the State, and in addition, that none of these circumstances stem from any alleged unlawful pressure upon either of the petitioners with the exception of the confession of Ware.

When we come to a discussion of the facts, the respondent thinks that following the usual order of matters, the guilt of Ware should be first discussed and later the guilt of Ashcraft as accessory. When we come to the question of the guilt of Ware, it seems to the respondent that the trial jury were well warranted in concluding that he was guilty because his confession is bolstered up by so many circumstances that the jury were almost required to accredit it from such corroboration by additional facts. Of course, the confession if taken as true makes a case of guilt against

Ware beyond peradventure and no further comment need be made upon this.

When we come to the circumstances corroborating the confession, it seems to the writer that they are numerous. In the first place, we have the muddy footprints upon the cushion of this car and the subsequent procurement of the shoes of Ware and a demonstration before a jury as to how accurately the left foot of Ware fitted this footprint. Apparently this demonstration must have been conclusive because the record discloses that counsel representing Ware failed to cross-examine this witness about any discrepancy between the footprints and this shoe, and this fact in itself would seem to indicate that the fit was perfect. This muddy footprint beyond question was made by one of the perpetrators of this murder and Ware, while upon the stand, does not deny the shoes used were his property nor does he make any reference to such. Obviously from this circumstance, the jury were completely warranted by their action in concluding that Ware was at the scene of the crime, and he could not have been at the scene of the crime and have made a muddy footprint upon this cushion without being one of the perpetrators of the crime.

Next, we have the circumstances testified by the officers and evidently accredited by the jury that on the morning following his confession Ware was able to take them from his home to Asheraft's home and thence to the scene of the homicide. Now then, so far as the record be concerned Ware had never been to Asheraft's home prior to the day of the homicide and his ability to take them from his home to that of Asheraft with a mile intervening, with no previous knowledge of the location of Asheraft's home and his further ability to carry them over the route taken by deceased and to the scene of the crime, indicates most definitely his connection therewith. Otherwise there would have been no possible way in which he could have been so accurate.

The third circumstance connecting Ware with the homicide and showing the guilt of Ware and the truthfulness of his confession consists in the fact that no blood was found upon the dress of deceased. It must be remembered that the medical testimony is to the effect that the wounds on the head of deceased were of such a nature as to bleed most freely. In fact, one of them severed an artery and would cause spurting and yet no blood could be found upon this dress when the body of deceased was taken from the water. It seems obvious to the writer that the deceased was struck upon the head with these rocks after she had been placed in the water or while she was standing in the water. Had she been struck at any other point, the flow of blood naturally would have gotten on the dress, but if she was struck while in the water, either the water itself might have lessened the flow of blood or the water would have diffused the blood from the head of the deceased in the water to the point where no blood would have reached the dress.

Another circumstance that tends to show Ware's guilt consists in his absence from work substantially all day following the killing and for four days thereafter. Ware in his confession makes the statement that Ashcraft allowed him to keep $50.00 that had been given him by deceased as a part of the pretended robbery, and since the record shows Ware to be more or less illiterate, ordinary run-of-the-mine negro, what would have been more natural for him with this newly obtained wealth than to conceive an excuse to leave his job upon that morning and have a glorious time so long as this money remained in his hands. This inference is further borne out by the fact that five days later Ware returned to work and this would be about the normal period of time that it would take a person of Ware's mentality to exhaust this amount of money.

Then, we come to the wrist-watch angle. It must be remembered that Ware in his confession testifies that he

took the wrist watch from the deceased and gave it to Ashcraft at the latter's request. Up to that time, the finding of this wrist watch had not figured in the slightest degree in the investigation and its significance was not realized until Ware made this statement. That the statement must be true is undoubtedly correct because not having realized the significance of it prior to Ware's mention of that fact, it could not have been suggested to him by any degree of comparison.

It is perfectly true that no witness testifies whether or not Mrs. Ashcraft was wearing this watch when she left upon this morning. It would seem most natural that a lady going on a trip of this duration would wear a wrist watch for her own convenience, but the respondent thinks there is another circumstance in the record that definitely leads to the conclusion that she did wear this watch upon this occasion. Cora Taylor, the maid of the deceased who came to clean her house on the day of the homicide, testifies that she found this wrist watch lying upon a box and that she put it in the chest of drawers obviously for better protection. Now then, the respondent thinks this involuntary gesture on the part of this negro woman indicates that the deceased had this watch when she was murdered. Mrs. Ashcraft intended to be absent from her home for sometime upon this visit and her normal instinct had she not intended to wear this wrist watch would have been to do the same thing as was done by this negro woman, and had she not worn it, she certainly would have put it in a more secluded place and would not have left a jewel of this value lying out in the open where it would be exposed to any person who might break into her house or otherwise obtain admission. Its presence at the point where it was found is consistent only with one theory and that is that Ware gave this watch to Ashcraft as stated by Ware in his confession and that Ashcraft, in the hurry and excitement, placed it on

this box where it was found and so this fact points to the truthfulness of Ware's confession in this respect.

Then finally, the nature of the homicide is completely consistent with Ware's confession. Obviously, the deceased was not criminally assaulted. Likewise, the definite showing is that this was not a homicide committed for the purpose of robbery. The normal robber would have been attracted by the gold pin at Mrs. Ashcraft's throat. He certainly would have gone through her suitcase to see if there were any valuables contained therein, and finally, it is certain that Mrs. Ashcraft would not have resisted a robbery to the point where the bandit would have been compelled to take her life to accomplish his purpose. Now under these circumstances, with it definitely being shown that the homicide was not committed for either of these two purposes and with the record failing to disclose a single enemy on the part of deceased, it obviously seems that she must have been murdered at the direction of or by someone who desired to get rid of her. Under this record, no one appears other than Ashcraft who possessed any such desire, and with his acquaintance of Ware, it would seem most natural that he would turn to Ware as the object to accomplish this purpose.

For the reasons above stated, the respondent respectfully insists that it can not be said that there is not substantial evidence to support the verdict so far as the guilt of Ware be concerned.

The respondent thinks that when the guilt of Ware of this crime shall have been established, the circumstances unerringly point to Ashcraft as an accomplice or accessory before the fact therein. First of all, Ware under this record, does not appear to be the type of negro who would commit a crime of this type of his own volition. As stated above, he seems to be the ordinary type of negro, happy-go-lucky, and certainly there is nothing in his antecedents or his

previous record to justify even a surmise that he would have been guilty of a crime of this sort solely and alone. Asheraft was acquainted with Ware and had worked upon the same job with him and if Asheraft had planned the crime as the respondent insists, Ware would have been his natural choice as the instrument through which it should be perpetrated. He had carried Ware to work in his automobile several times, and although he may have known many other negroes upon this job at which he was working, his contacts with Ware seemed to have been more intimate and he would feel more justified in selecting Ware as the pliant tool to accomplish his purpose.

The absence of criminal assault, the absence of a bona fide robbery and the failure of the record to disclose any enemies that Mrs. Asheraft had, definitely point to but one conclusion in connection with this homicide and definitely point to a planned crime. The abortive effort to make it appear as though she had been robbed, of course, indicates an attempt to divert suspicion from the real motive for the crime and set the officers upon a wild-goose chase. In this connection, it must be remembered that Asheraft upon first being contacted by the officers and informed of the death of the deceased advanced the robbery theory. This is completely consistent with his guilt in this case. Likewise, his false statement about the deceased having $200.00 in this pouch at her throat also is harmonious with the intent and effort upon his part to advance the theory of robbery as the motive for the homicide. Now then, the normal instinct of one whose wife had been murdered without his connivance certainly would have been to first of all inquire about the details of the crime, the locus in quo and other first-thought matters. Obviously, the thought of the motive behind it, to the normal person, would have been completely secondary, and yet Asheraft's primary inquiry as to whether or not deceased had been robbed is directly in line with the

effort to have it appear that she had been robbed. In short, from this the jury might infer that Ashcraft sought to advance the theory of robbery as the motive for the homicide and thus divert suspicion from the real cause thereof.

The next circumstance which the respondent thinks makes Ashcraft out to be connected with the crime lies in the fact that Ware, the actual perpetrator, was able to commit this homicide; so far as the record goes, Ware himself testifies that he did not know that Ashcraft had a wife. He certainly did not know that Mrs. Ashcraft was going to Kentucky or was going to leave home the next day unless he obtained that information from the petitioner Ashcraft himself. So far as this record goes, only seven persons knew that Mrs. Ashcraft intended to make this trip and to leave at this early hour upon this morning. Of these seven, Ashcraft is the only one who was acquainted with Ware. Five of the other appear above suspicion. Cora Taylor, the negro maid, by both examination and investigation was absolved of any connection with the death of the deceased. The question naturally recurs as to how then was Ware able to place himself at a point where this homicide could be committed unless by the connivance of Ashcraft. Ashcraft is the only contact through which he might perpetrate this homicide, and that fact alone seems to the writer to necessarily indicate Ashcraft's complicity in the crime if, as we must assume, Ware committed it. Stated otherwise, Ware would never have known any of the movements of the deceased and would not have been able to place himself in position to commit the crime unless it was clearly by Ashcraft's connivance.

Then, we have the wrist-watch angle. We have discussed that in connection with the guilt of Ware and will not reiterate what has there been stated. The presence of this wrist watch at the place it was found clearly indicates that it was taken from the wrist of deceased at the time of the

homicide. Its presence in the home afterward is absolutely inconsistent with the innocence of Ashcraft and affords a strong circumstance of guilt.

Then another factor that the jury might well consider in connection with the question as to whether or not Ashcraft was an accessory before the fact consists in the ability, as testified to by the officers, of Ware to take them from his home to the home of Ashcraft. Under this record, Ware, who lived a mile away, had no previous knowledge of the location of Ashcraft's home and he could have acquired this knowledge only by having been at Ashcraft's home for the purpose of committing this homicide as testified in his confession. His ability to take the officers to this home indicates definitely a knowledge of its location. He could have acquired such knowledge only by a previous trip and under the sponsorship of Ashcraft and this previous trip could have occurred only for the purpose of committing the homicide.

Ashcraft's statements about the condition of this automobile are definitely shown to have been false. Those same statements indicating engine trouble, if taken as true, would have a tendency to lead one to conclude that perhaps engine trouble overtook this car at this lonely spot and caused its stoppage and thereby afforded an opportunity for some marauder to have committed the crime. Again, the normal effect of this statement, if believed, would have been to divert suspicion from Ashcraft and to cast it upon someone unknown. As above stated in connection with the discussion of the effort to make this appear as robbery, these statements of Ashcraft all point toward a common end and that of an effort to divert suspicion from him. Obviously, whenever a spouse be slain, an investigation thereof begins normally and naturally with the other spouse. As stated in the minority opinion upon the former appeal of this case to the Supreme Court of the United States, no inves-

tigation worthy of the name would not include Ashcraft. Were he astute enough to conceive the plan which apparently he did for the taking of the life of deceased, he was certainly astute enough to realize this factor and the jury might well have concluded that his efforts to establish a robbery and to establish the possibility of a mechanical breakdown of this car at this point were efforts upon his part to divert suspicion from him at a time when it had not been directed toward him. The trial jury might well have concluded that this was an instance of the exemplification of the truth of the adage that the guilty fleeth when no man pursueth, and were completely justified in taking it as a circumstance of guilt in the case.

Then too, the complete indifference of Ashcraft to the nature of the crime stands as a circumstance that the jury might properly consider as indicating guilt. His attitude as testified by various witness was so abnormal as to require more than passing notice. There was no inquiry as to how the deceased met her death, as to where she met her death or anything of the kind, but on the contrary, there was the immediate inquiry as to whether or not she had been robbed. Again, the desire to divert suspicion seemed to be paramount and the failure of Ashcraft to make any inquiry as to the details of the crime is completely consistent with the previous knowledge on his part as to how it occurred. This previous knowledge could have been obtained only by a participation therein.

Finally, Ashcraft certainly seems to have been supplied with a motive for so doing. The record discloses that the deceased was extremely nervous, that there were times when she would scream and carry on to the point that life with her must have been unbearable. The record discloses more than a suspicion that she was not able to consummate the marital relation due to this operation and with Ashcraft standing to come the sole owner of almost $7500.00

of their accumulations as a result of her accidental death, it can be seen that a substantial motive appears that might impel him to try to make away with her.

After all, this chain of circumstances certainly would warrant the jury in concluding that Asheraft counseled and advised and procured Ware to commit this crime. This Court could hardly say that Ware would have committed it of his own volition. He does not appear that type negro. If he committed it, and it seems obvious from the record that he did, he was employed to do it by someone else. That someone could be Asheraft only under this record.

For these reasons, it is insisted that the verdict as to Asheraft is supported by substantial evidence.

The method by which the Supreme Court of Tennessee reviews the facts in criminal cases is well settled by numerous of its decisions. The prevailing rule is that the verdict of guilty at the hands of a jury and the subsequent approval of such verdict by the trial judge removes the presumption of innocence theretofore prevailing upon the trial and converts it into one of guilt and that before a reversal will be had upon the facts in a criminal case, the evidence in the case must preponderate against such verdict.

Cooper v. *State*, 123 Tenn., 37, 60-61;
Mahon v. *State*, 127 Tenn., 535, 549.

The same rule applies where the evidence relied upon consists of circumstantial evidence alone.

Foster v. *State*, 180 Tenn., 164, 172.

From the discussion of the foregoing circumstances relied upon by the respondent as constituting substantial evidence to support the verdict of the jury and its subsequent affirmance by the Supreme Court of Tennessee, it will be seen that none of them with the exception of the confession of Ware can be claimed to have been extorted from either of the peti-

tioners by unlawful means. On the contrary, they were matters developed by investigation and with clues to some of them being revealed by Ware's confession.

The respondent insists that the rule which should prevail in this Court is that where the evidence be of such nature that the minds of reasonable men may arrive at different conclusions as to the inferences to be drawn therefrom, this Court should not constitute itself a superjury, but upon the contrary should accord to the findings of the state courts that degree of respect which our coordinate system of government implies as belonging to the several states. In the present case, the fact that the minds of reasonable men might differ as to the conclusions to be drawn from the circumstances is evidenced by the fact that a trial jury reached the conclusion therefrom that the petitioners were guilty, their verdict was approved by the trial judge sitting as a thirteenth juror under the rule prevailing in Tennessee (See *Curran* v. *State*, 157 Tenn., 7), and a subsequent affirmance of the verdict by the Supreme Court of the state after an investigation to determine whether or not it preponderated against the evidence.

The next insistence on behalf of petitioners, in the opinion of the respondent, presents no appropriate question for review at the hands of this Court. It is the insistence that the mandate of the Supreme Court of Tennessee required the trial judge to hold inadmissible in evidence the confession of Ware. This question was strenuously urged upon the Supreme Court of Tennessee upon the appeal, to review which this petition is filed, and was denied and overruled by that Court. The respondent insists that the proper construction of its own mandate or procedendo, as such is termed in Tennessee, presents purely a question of state law upon which the decision of the state courts must be final. Of course, if the mandate of the Supreme Court of Tennessee did not conform to that of this Court in revers-

ing the case, then such would be reviewable by this Court; but when the opinion of this Court on the former appeal be examined, it may be seen that it merely held that the confession of Ashcraft was procured by illegal and unlawful methods and that its introduction in evidence against him constituted a violation of his constitutional rights, and for its error in holding such confession admissible, the judgment of the Supreme Court of Tennessee was reversed and the cause remanded to that Court; and at the same time the conviction of Ware was vacated in order that the Supreme Court of Tennessee might reconsider his appeal in the light of the holding of this Court as to the admissibility of the confession of Ashcraft. There was no direction by this Court in either its opinion or its mandate that further prosecution of the petitioners be terminated. It would have been an undue intrusion on the part of this Court into the province of the state courts had such a direction been made, and the opinions of this Court disclose that it is most careful to undertake to assiduously observe the line of demarcation between its functions and those of the courts of the several states.

Much ado is made in the petition of a concession by counsel upon the argument of the former appeal in this case to the effect that in the absence of a confession, there was insufficient testimony upon which to sustain a conviction. This concession in reality became of no moment in the decision of this case because shortly thereafter this Court expressly held that where the constitutional rights of one charged with crime were violated by the admission of an extorted confession, such action required a reversal despite the fact that there might be sufficient evidence apart from such confession upon which the verdict might rest. See footnote 1 to *Lyons* v. *Oklahoma, supra.*

After all, the sufficiency of evidence to convict lies primarily within the province of the triers of fact, the trial

jury. The trial court and also the various appellate courts, of course, have functions in connection therewith upon appeal but the concession of counsel, following his recognition that the admissibility of the confession presented reversible error for which the judgment would have to be reversed irrespective of the other supporting evidence, does not constitute an adjudication that would prevent a re-examination of the evidence in the case and a different determination upon a more mature consideration of the various circumstances.

The fact that upon another trial, twelve triers of the fact, the trial judge who presided with impartiality and the court of last resort of Tennessee were all of a different opinion from counsel who made the concession, demonstrates concretely a sound reason why such concession should not have the binding effect of an adjudication. Facetiously speaking, it might be stated that this does not constitute the first occasion upon which the courts have differed with the writer of this brief who was counsel making the concession and he fears that it will not mean the end of such divergence of opinion.

The next insistence is made primarily on behalf of the petitioner Ashcraft and is to the effect that his constitutional rights under the Fourteenth Amendment were violated and due process denied him by the action of the trial court in declining to grant him a separate trial from his co-petitioner. No doubt this contention was suggested by the dissenting opinion of Mr. Justice Rutledge in *Malinski* v. *N. Y.*, *supra*, but the facts of the cases are so unlike that the dissent in that case is hardly applicable to the present case. In *Malinski* v. *N. Y.*, *supra*, the co-defendant Rudish was jointly indicted with Malinski for homicide. In the present case although it is true that petitioner Ashcraft was jointly indicted with Ware for the homicide of deceased, he was also indicted as an accessory before the fact which

charged him with having incited and procured Ware to slay the deceased. He was convicted upon the count of the indictment charging him with being an accessory before the fact to such homicide, which under Tennessee procedure operated as an acquittal of the charge of murder as to him.

Tennessee still preserves the common law distinction between principals and accessories before the fact. See *Pierce* v. *State*, 130 Tenn. 24. The common law rule, however, is subject to the statutory change that an accessory before the fact may be prosecuted and convicted prior to the conviction of the principal. See Code of Tennessee, Section 10761.

The rule in Tennessee with reference to separate trials is that the prosecution is entitled to have tried jointly all persons jointly indicted unless it shall appear either before or after such joint trial that prejudice will result or has resulted from such joint trial. See *Woodruff* v. *State*, *supra;* and *Kennon* v. *State, supra.* This rule can not be said to be so lacking in reason as to deny due process but, on the contrary, is a matter well within the realm which our joint system has confided to the various states.

Following the common law concept of an accessory before the fact, it is always necessary, before one may be convicted as an accessory, that the guilt of the principal offender be established and, to this end, any evidence which would be admissible against the principal is admissible against the accessory, not, of course, to establish the guilt of the latter but, on the contrary, to establish the guilt of the principal of the offense which it is claimed that the alleged accessory counseled and advised.

Under the rule prevailing in Tennessee as well as the overwhelming weight of authority, the confessions of a principal to the effect that he committed the principal crime are always admissible against the accessory not for the purpose of establishing the latter's connection but for the

purpose of showing the guilt of the principal. See *Givens* v. *State, supra; Hale* v. *U. S., supra.*

Mr. Wigmore in his work on Evidence lays down this rule. See Section 1079, Third Edition.

Now then, the only insistence made on behalf of Ashcraft under this assignment is that he was prejudiced by the admission of Ware's confession, and as we have said, this confession would have been admissible upon his separate trial. If this confession could not have been excluded upon such a separate trial and as above seen, it could not have been, it is difficult to conceive just how petitioner Ashcraft was prejudiced by this joint trial. The trial judge very definitely instructed the jury during the progress of the trial that the statements in such confession indicative of Ashcraft's guilt were not admissible against him and must not be considered by them (Tr. pp. 169-70, 208, 209, 227, 248). In addition thereto, the trial judge expressly instructed the jury in his general charge that they would not consider such statements against Ashcraft (Tr. pp. 381, 383). This was in keeping with the rule in Tennessee. See *Porter* v. *State*, 177 Tenn. 515, 521. We respectfully insist that this contention is without merit.

Although not specifically mentioned in specification of errors (and this demonstrates again the zeal on behalf of petitioner Ashcraft and apparent indifference as to Ware), the next question presented deals with the admissibility of the confession of Ware. After petitioner Ashcraft had informed the officers that a negro had killed his wife and that he could show them where the negro lived, giving Ware's name in this connection, the officers in charge of the investigation put Ashcraft in an automobile with them and he directed them to where Ware lived. Ware was arrested at approximately midnight and without dispute was immediately taken to the Shelby County Jail. There is a dispute as to what occurred at that point. The arresting

officers testify that when Ware was confronted with Ashcraft, in response to a question from the officers he admitted that he was acquainted with Ashcraft and within five minutes afer he reached the jail, he asked the officers if they wanted the truth about the transaction and made the statement to Ashcraft that he did not intend to take the entire blame. The persons in charge of the investigation, four in number, all testify that when Ware was brought to the jail he was immediately carried to the fifth floor thereof and remained on that floor until he was taken down for arraignment the next morning, and they all testify that no threats of any kind were made against him and that he was not mistreated. Mr. Waldauer, a Court Reporter of unquestioned integrity in Memphis, was called to the jail and began taking down Ware's confession at 2:15 according to his notes. Ware arrived at the jail at approximately 1:00 A. M. according to the testimony of Mr. Becker, who was in charge of the investigation. In addition, Mr. Waldauer testified that he inquired of Ware as to how he had been treated and that Ware informed him that he had not been harmed.

Against this testimony of four witnesses on the part of the prosecution who were present when Ware was arrested and brought to the jail, the petitioners rely upon the unsupported testimony of Ware to the effect that he was beaten, placed in a padded cell of uncomfortable nature and threatened with mob violence. As was recognized in the minority opinion in this case upon the former appeal, there is no testimony except that of Ware as to any mistreatment.

Now then, conformably to the practice in Tennessee, when the question of Ware's confession was first brought up, the trial judge excluded the jury from the courtroom and after hearing testimony upon this question, found that the confession was freely and voluntarily made (Tr. p. 206). In addition thereto, in his charge he instructed the jury that

before they could consider the alleged confessions of Ware, they must find beyond a reasonable doubt that such confessions were made freely and voluntarily, and if they had a reasonable doubt as to this fact, they would not be considered (Tr. pp. 282-283).

In addition to this fact, after a review of the evidence upon this point, the Supreme Court of Tennessee expressly found that the confession was not produced by duress or threats.

The respondent realizes that this Court will make an independent examination of the facts in each case where it is claimed that a confession was extorted, but in the present case it must be remembered by this Court that only the party who stands to gain by the exclusion of a confession testifies as to any relevant facts justifying the exclusion of such confession. Ware is contradicted by every other witness who testifies. His testimony to the effect that he was taken to the second floor of this jail and placed in the padded cell, which actually is upon that floor, is contradicted by the testimony of Becker, Battle, Ezell and Jaroe to the effect that he was not taken from the fifth floor of this jail until sometime the next morning long after the confession had been made and signed by him. There is a contention on behalf of Ware to the effect that his knowledge of this padded cell could not have been obtained in any other manner. But when it is remembered that Ware was confined in this jail from June 15, 1941, until his first trial sometime the following November and thereafter until other proceedings in the case, it would be strikingly strange if the so-called jail grapevine had not accorded him abundant opportunity to learn of the existence of this padded cell. It is much more reasonable to conclude that Ware, who, as stated by Mr. Justice Jackson, "is obviously a much weaker person than Ashcraft," was astounded by the sudden confrontation with Ashcraft, his alleged partner in

crime, and that this unexpected sight caused him to realize his only hope of safety lay in the direction of a full and complete disclosure of his part in the homicide.

When it be considered that Ware is the only person testifying to coercive methods on the part of the officers, when it be considered that four of them testify to the contrary, and in addition, Ware is contradicted by his statement to Mr. Waldauer and when it be further remembered that the trial judge who observed all of the witnesses and the trial jury who likewise saw and heard the witnesses in person have found that the confession was not obtained by duress and that their sanction was approved by the Supreme Court of Tennessee, it strikes the writer that this Court, even after an independent examination, should be most hesitant to overturn the findings of the lower court upon this question based, as such would necessarily be upon the unsupported testimony of the person who stands to gain most by such action on the part of this Court.

Apparently counsel for the petitioners must realize the effect of the evidence in the present case because he primarily relies upon the fact that Ware was under arrest, that he was questioned and that he was not represented by counsel at this time. So far as Ware's arrest be concerned, it was completely lawful. Section 11536, subsection (4) of the Code of Tennessee authorized Ware's arrest upon this charge after Asheraft had informed the officers that he had slain the deceased. The rights of officers under such circumstances have been set forth by the Supreme Court of Tennessee in the case of *Dittberner* v. *State*, 155 Tenn., 102, 105; and *Jones* v. *State*, 161 Tenn., 370. Summarizing these decisions, it will be seen that the duty of an officer is to act with such promptness as may seem appropriate to him, and there can be no suggestion that an immediate arrest of one charged with the homicide was not both desirable and required by the circumstances. So far as the contention

be made that the confession was elicited by questions, this Court recently held in *Lyons* v. *Oklahoma, supra*, that questioning of a suspect while in custody is not prohibited either as a matter of common law or due process. As to the contention that petitioners should have been arraigned prior to questioning, we merely wish to call to the attention of the Court the cases of *Wynn* v. *State, supra;* and *State* v. *National Surety Company, supra.* These cases construing state statutes as they do, are binding on this Court as to the effect and meaning of such statutes.

It is finally insisted that since the county in which this crime was committed has a statute creating the office of public defender, it was the duty of the officers to call such public defender. The statute in question is partially set out in the petition for certiorari and the contention in this respect constitutes but another instance of the reckless and extravagant statements contained in the petition. The statute in question is Ch. 69, Private Acts of 1917. Section 3(a) of it governing the duties of the public defender, reads as follows:

> "That upon *request by the defendant,* or upon order of the Court, it shall be the duty of the Public Defender to defend, without expense, *and to represent generally,* all persons who are without means to employ counsel, who have been indicted, by the grand jury or charged with the commission of any crime and *he shall, also, upon request, give counsel and advice to such persons* in and about any charge against them upon which he is conducting the defense, and he shall prosecute all appeals to a higher Court or Courts of any person who has been convicted upon such charge, where, in his opinion there is error in the conviction had, and such appeal will, or might reasonably be expected to result in the reversal or modification of the judgment of conviction." (Italics ours.)

In the excerpt from this same statute contained in the petition for certiorari, the first portion thereof providing for a request by the defendant is omitted and the words "also upon request" are omitted with reference to the duty of the public defender to give counsel and advice, merely another example of the inaccuracies with which the petition is replete.

Thus it can be seen from the very language of the statute itself and in direct contra-distinction to the extravagant claims of opposing counsel, a request for the services of the public defender is a condition precedent to his representation of any party charged with crime except where he be appointed by the court. The testimony in the case indicates definitely that no request was made by Ware for an attorney. Becker says he made no request for such and Ware himself makes no claim that he asked to see a lawyer and was denied this privilege. One thing appears rather definitely from the quoted statute and that is until a request for his services emanate from one charged with crime, this public defender is under no obligation to volunteer his services, and likewise in the absence of such request, the officers in charge of a suspect are under no obligation to enlist the aid of the public defender.

The respondent believes that the following language written by Mr. Justice Rutledge, while a member of the Court of Appeals of the District of Columbia, completely answers the contention of the petitioners in this respect:

> "Confessions, it is said, do not become involuntary because elicited by questions, or made while the confessor is under arrest, or in the absence of counsel, without warning or caution that the statement may be used against him, nor by the concurrence of all these conditions in a single case. *Admittedly these principles apply when the statement is not made in the course of judicial proceedings.*" (Italics ours.)
>
> *Wood* v. *U. S.*, 128 Fed. 2d 268.

For the reasons stated, the respondent insists that the confession of Ware was properly admitted and none of his constitutional rights were violated in this regard.

The next insistence is made upon behalf of Ashcraft alone, and is to the effect that the trial court erred in admitting any testimony whatsoever with reference to conversations of Ashcraft from 7:00 P. M. on Saturday night, June 14 until approximately 11:00 P. M. on June 15. By reference to the record it may be seen that there were only four statements made by him during this period that are of the slightest interest. They are (1) a statement that he realized that the circumstances pointed toward him but that he was not guilty; (2) the statement that a negro had killed his wife; (3) the statement that this negro's name was John or Tom Ware; and (4) a statement that he could show the officers where this negro lived.

Now we wish to call to the attention of the Court the fact that in none of these four statements is there anything akin to an admission of guilt upon the part of Ashcraft. Upon the contrary, the first statement contains an emphatic denial of his guilt and the latter three, which might properly be grouped as one, are to the effect that not he but John Ware had killed the deceased. There is no admission of guilt in this latter suggestion. Neither are any of these statements relied upon by the respondent as demonstrating the guilt of Ashcraft. In an earlier part of the brief we have referred to the circumstances relied upon to show Ashcraft's guilt. A reference to such will reveal that not one of these challenged statements is adverted to in our argument upon this proposition.

Counsel for petitioners have made as an exhibit to the petition for certiorari their reply brief in the Supreme Court of Tennessee. By reference to such reply brief, it will be seen that the prosecution in the Supreme Court of Tennessee expressly disclaimed any reliance upon these statements

or any part thereof as a circumstance tending to show guilt. The quoted portions of the brief for the prosecution in the Supreme Court of Tennessee will not be repeated here, but suffice it to say, they contain an emphatic declaration that none of these matters are relied upon as circumstances of guilt.

The respondent thinks it a logical inference from the record that the same was true of the trial court. Counsel for petitioners were not rationed when it came to making objections and neither were they niggardly or parsimonious in their use of objections. Had the prosecution in argument undertaken to refer to any of the facts revealed by this testimony, it is not an unreasonable inference to assume that opposing counsel, as diligent as they have been in the presentation of this case, would have interposed objections thereto, and since the record fails to reveal any objections on their part to argument to the jury relying upon these matters, it is a safe assumption that no such argument was made.

The respondent respectfully insists that prejudice forms the test of exclusion, and irrespective of the nature of the conduct of the investigating officers with reference to Ashcraft, yet no prejudice to him resulted therefrom, and he would not be entitled to a reversal of the judgment merely because he might have been mistreated by investigating officers. Had he been mistreated by them but without making any statements whatever or a confession, certainly it could not be said that his case should be reversed merely because of such mistreatment irrespective of whether or not he was prejudiced thereby. The situation is the same in the instant case, for where these statements were not utilized as a means of convicting him and certainly were not relied upon in the appellate court as evidencing his guilt, there appears that lack of demonstrable reality held necessary by this Court in *Adams* v. *U. S.*, *supra*, and in *Buchalter*

v. *N. Y., supra,* to a reversal of the judgment of the lower court upon the ground of unfairness.

The leading counsel for the petitioner Asheraft was evidently of the same opinion. When the testimony was offered, he made the following statement:

"Mr. Bickers: *I take it that they want to develop from this witness that the first information they had about a negro being involved came from this witness. I cannot complain of this* but, I can of this proposition that from the time of 7:30 that Saturday night until 8:30 Monday morning what he admitted to him to be a confession, is a part of the thing itself, and part of the entire confession, and *I don't think under the law that one line from the time he was brought into the jail at 7:30 Saturday night until Monday morning, under the rule of evidence, is competent. It don't hurt me for him to say during the investigation I believe about the negro killed his wife, I think that is what he wants to develop, but I take the position that this man was detained,* taken at 7:30 to the fifth floor of this jail, admittedly by every witness for the State, that he was placed behind the table with a light over him, and Mr. Becker on this side and Gen. Battle on this side, beginning at 7:30 Saturday night and ending at 8:30 Monday morning. I insist that every act of every witness in this case has been fully developed and scrutinized and passed on by the Supreme Court of the United States. I objected to that and stopped him right now, that he has no right to testify in the face of the record —four witnesses of the state admitted—that they brought him in at 7:30 Saturday night and described in detail how he was placed and what happened—he was examined by relays. That statement was corroborated by the other 4 witnesses in the case. From that testimony I insist the line of demarcation—I cannot distinguish between 7:30 and 8:30 Monday morning, in a case where Asheraft is being tried." (Italics ours.) (Record, pp. 158-9.)

The respondent feels that this attitude upon his part with reference to the prejudicial effect of the statements is the correct one. Having admitted at the time that the effect would not be prejudicial but that as a technical matter of law, the entire proceedings were inadmissible under the opinion of this Court on the former appeal, it would seem that the present contention savors somewhat of an afterthought.

As above mentioned, none of the declarations in question on the part of Asheraft during this period were of an incriminating nature. On the contrary, they were all exculpatory. The opinion of the Supreme Court of Tennessee has discussed most thoroughly the difference between the necessity for a showing of the voluntariness of confessions and exculpatory statements. The writer can add nothing to the discussion of this question contained in the opinion of the Supreme Court of Tennessee and respectfully refers the Court to it for that purpose.

Finally, it would seem that the evidence in question was clearly relevant upon another phase of the case. Relevancy is always the pole star of admissibility. Petitioner Ashcraft's co-defendant Ware was insisting strenuously in the trial court as in this Court that Ware's confession was coerced and brought about by an illegal arrest. Under the Tennessee statute cited above, an officer may without a warrant, arrest upon the charge made to him upon reasonable grounds of the commission of a felony. Since Ware was making this contention it was entirely proper for the prosecution to show that Asheraft had made a statement accusing Ware of this homicide and it was likewise permissible for this statement to be given in evidence before the jury, for in determining whether or not they would accredit Ware's confession, that body was entitled to take into consideration all of the circumstances surrounding the making of the confession, including the question as to

whether or not the arrest was authorized or illegal. For the reasons stated, the respondent respectfully insists that no error was committed in permitting the admission in evidence of Ashcraft's statements during this period.

The final contention is that the trial court denied to both petitioners the right to read to the jury the opinion of this Court upon the former appeal of this case. By reference to the record, it will be seen that the trial court did not deny counsel for the petitioners the right to read the law contained therein to the jury but forbade a reading of the facts stated in the opinion of this Court.

As noted in the brief proper, the general rule is that such matters lie within the discretion of the trial court. The note to 77 A. L. R., 656, makes this perfectly clear. Even in those jurisdictions which do permit as a matter of right the reading of opinions to the jury, it has been held improper to permit a reading of the facts as detailed by the appellate court upon a former trial of such case. See *People* v. *Paisley, supra.*

The rule in Tennessee is to the same effect. See *Smithson* v. *State, supra;* and generally upon the right to compare the facts of the instant case with those of reported cases, see *Davis* v. *State, supra.* At least the exercise of discretion on the part of the trial judge, a practice sanctioned by the overwhelming weight of authority in this country and in direct keeping with the rule in Tennessee, should not be held to be so unfair as to offend against the Fourteenth Amendment.

Again, the respondent wishes to call to the attention of the Court the numerous extravagant statements and claims made on behalf of the petitioners. Space would not permit a detailed answer and expose of each of them but the careful reader of the transcript will, in the opinion of the writer, find that the horrendous import of the petition for certiorari is by no means sustained by the transcript but the

transcript fails to bear out and support the extravagant claims of the petition.

Before closing, the respondent wishes to emphasize and reiterate a statement made to this Court upon the former appeal. It feels that from a careful investigation of the record the petitioner Ashcraft was the moving spirit in the death of the deceased and that without his instigation, petitioner Ware would never have dreamed of committing this crime. Ware occupied almost the same inanimate position in the hands of his co-petitioner as would any other type of weapon. The writer of this brief in his official position representing the State of Tennessee in criminal prosecutions, has never felt that where there be two criminals involved, one of greater and one of lesser degree, that the greater should escape while punishment was meted out to the lesser. Such does not comport with the writer's sense of justice and so as was the case upon the previous appeal, the respondent respectfully suggests to the Court that in case Ashcraft's appeal be sustained and the judgment reversed again as to him, the same procedure be followed as formerly and that the judgment of the Supreme Court of Tennessee as to Ware be again vacated and the cause remanded to that court.

For the reasons above stated, the respondent respectfully insists that the petition for certiorari is without merit and should be denied.

Respectfully submitted,

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ROY H. BEELER,
Attorney General,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 381

E. E. ASHCRAFT AND JOHN WARE,

Petitioners,

vs.

STATE OF TENNESSEE,

Respondent

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF ON BEHALF OF RESPONDENT.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 381

E. E. ASHCRAFT AND JOHN WARE,
Petitioners,

vs.

STATE OF TENNESSEE,
Respondent

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

MAY IT PLEASE THE COURT:

Comes the respondent, State of Tennessee, and moves the Court for leave to file a supplemental brief herein, copy of which accompanies this motion.

We realize that the Court desires all questions presented in the original brief but in the present case, this brief will be directed to a question not specifically raised by the petition for certiorari.

It was not until the oral argument of this case that the attention of counsel for respondent was directed to what seems to be the crucial question in the case, namely, whether the statements made by the petitioner Ashcraft were confessions or were as held by the Supreme Court of Tennessee exculpatory statements. There was no specific challenge on the part of the petitioners to this holding of the Supreme Court of Tennessee and while we do not insist such failure to specifically challenge its holding would

operate to deprive this Court of jurisdiction, we do insist that it furnishes some slight excuse for the neglect of counsel to realize the precise question upon which this Court granted the writ of certiorari.

Besides, due to unavoidable misadventure, counsel for respondent did not receive a copy of the printed transcript in this case until January 21, 1946, and the intervening time between that date and the date on which he was forced to come to Washington was hardly adequate to allow a full consideration of the questions presented.

WHEREFORE respondent prays leave to file its supplemental brief herein.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 381

E. E. ASHCRAFT AND JOHN WARE,

Petitioners,

vs.

STATE OF TENNESSEE,

Respondent

SUPPLEMENTAL BRIEF ON BEHALF OF RESPONDENT

MAY IT PLEASE THE COURT:

This brief will be addressed to the sole question as to whether or not in cases coming to it from State Courts under the due process clause of the Fourteenth Amendment, it will impose upon State Courts the rule laid down by this Court in *Bram* v. *U. S.*, 168 U. S., 532, as to what constitutes a confession or whether in view of the conflict of authority upon this question hereafter mentioned, it will leave to the State Courts the privilege of adopting that view which such Courts may seem most suitable for their local problems.

I

Bram v. *U. S.*, *supra*, of course, came to this Court upon direct appeal from a judgment of conviction in a District Court of the United States. The present case, of course, does not come to this Court directly from a Court of the United States but comes to it under its power to review

judgments of State Courts allegedly in conflict with the due process clause of the Fourteenth Amendment. Between the powers of this Court in these two types of cases, the respondent respectfully insists that there exists a great gulf.

We concede that this Court has ample power and authority to adopt such doctrine as it may deem appropriate for the trial of cases in inferior courts of the United States, under its general supervisory powers of such Courts. But when a case be reviewed by this Court coming from a State Court where the claim be made that the due process clause has been infringed, the authorities indicate that the scope of review by this Court lies in a much more narrow compass and that its power is not so sweeping.

Lisenba v. *Cal.*, 314 U. S. 219, 236;
McNabb v. *U. S.*, 318 U. S. 332, 340;
U. S. v. *Mitchell*, 322 U. S. 65, 68;
See also Opinion by Mr. Justice Jackson in
Ashcraft v. *Tenn.*, 322 U. S. 143, 158.

II

While *Bram* v. *U. S.*, *supra*, does hold statements of the nature made by the petitioner Ashcraft in the present case to be confessions, the overwhelming weight of authority in the State Courts in this country is to the contrary. The cases are reviewed by Mr. Wigmore in the Third Edition of his work on Evidence, at Section 821, Vol. 3, p. 238. In the present case, the Supreme Court of Tennessee held directly that the statements in question were not confessions but were exculpatory statements or denials of guilt (Tr. p. 277). Mr. Wigmore is highly critical of the doctrine announced by this Court in *Bram* v. *U. S.*, *supra*., terming it "the height of absurdity in misapplication of the law."

We mention this conflict of authority upon the question to demonstrate that as to declarations and statements of

this type, the minds of reasonable men may well differ as to their nature. We now make no effort to determine which is the true rule. We do insist, however, that where the minds of reasonable jurists reach opposite conclusions as to the nature of statements of this type as must be true from the conflict in the decisions, the Fourteenth Amendment does not require this Court to impose the Federal rule in this case upon State Courts but should leave to such Courts in these border line cases the power to select that rule which best fits their local conditions.

To impose upon State Courts the rule announced by this Court in *Bram* v. *U. S., supra*, would result in each State being required to adopt the decisions of this Court in their entirety with reference to the admissibility of all statements and alleged confessions made by one held upon a criminal charge. But it has been expressly held by this Court that the Fourteenth Amendment leaves the several states free to adopt and enforce such rule as they may elect irrespective of that prevailing in the Federal Courts. See *Lisenba* v. *Cal., supra*, 236.

Again, in *McNabb* v. *U. S., supra*, and in *U. S.* v. *Mitchell, supra*, this Court was most careful to point out that the rule there announced with reference to the admissibility of statements made by the accused prior to arraignment were applicable only to the Federal Courts and that the State Courts might adopt such rule as they desired. We respectfully insist that this same grant of power should apply to the determination of questions of the type presented here where at least the weight of authority appears to be contrary to the decisions of this Court in *Bram* v. *U. S., supra*. A reference to the cases cited by Mr. Wigmore in the note to his text will disclose that a number of such cases hold declarations more incriminating than those in the case at bar exculpatory in nature and for that reason not confessions.

Another result to be anticipated from the application to State Courts of the holding in *Bram* v. *U. S., supra*, is that each time any statements of one upon trial for criminal offense be admitted in evidence, such admission will become reviewable by this Court under the due process clause by reason of the fact that such admission in evidence of such statement may conflict with a holding at the hands of this Court. This Court has said that the Fourteenth Amendment does not bring to the test of decision by this Court every ruling made by a State Court in the course of a criminal trial thereon. See *Avery* v. *Alabama*, 308 U. S. 444; *Buchalter* v. *N. Y.*, 319 U. S. 427. It would seem that the application of this rule would grant to the Courts of last resort of the several states the power to determine the nature of the statements of this type and that it does not require that they conform to a uniform standard.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES.

No. 381.—October Term, 1945.

E. E. Asheraft and John Ware, Petitioners, *vs.* State of Tennessee. | Petition for a Writ of Certiorari to the Supreme Court of Tennessee.

[February 25, 1946.]

Mr. Justice Black delivered the opinion of the Court.

Mrs. Zelma Asheraft was murdered in Shelby County, Tennessee. The petitioner Ware was convicted for the murder. The petitioner Asheraft, husband of the deceased, was convicted for being an accessory before the fact. The Supreme Court of Tennessee affirmed the convictions. We reversed the judgment as to Asheraft, vacated it as to Ware, and remanded the case to the Supreme Court of Tennessee for further proceedings not inconsistent with our opinion. *Asheraft* v. *Tennessee*, 322 U. S. 143. The State Supreme Court then ordered the case remanded to the Criminal Court of Shelby County with the same directions as to further procedure. The petitioners were again convicted and the State Supreme Court affirmed.

Our reversal of Asheraft's first conviction was on the ground that his conviction resulted from a trial so conducted as to deprive Asheraft of due process of law in violation of the Fourteenth Amendment. At that trial the state had been permitted to introduce in evidence an alleged confession which had been obtained from Asheraft after thirty-six hours continuous grilling by investigating officers, who were holding him incommunicado in the County jail. This alleged confession was in large part written but Asheraft had neither written nor signed it. Ware's conviction had also rested on a confession, the admission of which as evidence he had challenged as a denial of due process. Without passing on the Constitutional question raised by Ware, we vacated the judgment against him for other reasons stated in our opinion. In the joint trial of both petitioners which resulted in the judgment now before us, the state again introduced Ware's confession. His objection to it, based on the due process clause was

overruled. Before reaching the issues raised by Ware, we shall dispose of the questions which Ashcraft now raises.

In our first opinion we pointed out in detail alleged incriminatory admissions used to convict Ashcraft and the circumstances under which he had made them. In summary those statements and circumstances were these. On a Saturday at 7:00 P.M., nine days after his wife was found dead, officers went to Ashcraft's home and took him to a fifth-floor county jail room. There he was held without rest or sleep until 7:00 o'clock Monday morning, or 36 hours. During the entire time Ashcraft was subjected to a constant barrage of questions and charges. According to the officers' testimony he, for about 28 hours, consistently denied any knowledge about, or complicity in, the crime. The officers swore, however, that after 11 P.M. Sunday night Ashcraft finally confessed that he knew who killed his wife, but at the same time denied that he had done it. According to this testimony Ashcraft said that Ware had come to his home before daylight, just as Mrs. Ashcraft was getting in an automobile to take a journey; that he watched Ware force Mrs. Ashcraft to drive the automobile away from home with Ware accompanying her; that Ashcraft, after making slight but ineffective protests went back to his room, later went to work, and that he made no report to the officers but kept his knowledge secret because he was afraid of Ware. Later on the Sunday night that Ashcraft was being interrogated in the jail, a court reporter was summoned and he, according to the evidence, took down complete confessions of guilt given both by Ware and Ashcraft. The reporter completed transcription of his notes about 7:00 o'clock Monday morning. These transcribed notes were offered as to both the petitioners in the first trial. Witnesses at that trial, including Ashcraft's doctor, also swore that both Ashcraft and Ware had been caused to strip for complete physical examinations. The only apparent purpose of this was to counteract any later claim by Ware or Ashcraft that their alleged confessions were the product of physical mistreatment.

At an early stage in the new trial, resulting in the conviction we are now reviewing, the prosecuting attorney announced that he intended to use this jail evidence again, "about everything but the confession." And that was done. The witnesses for the state in the first and the second trials were the same. Construing our mandate as prohibiting only the admission of the written un-

signed confession, the trial judge allowed the jury to listen to testimony narrating everything else that took place during the entire 36 hours Ashcraft was questioned with no one present but his inquisitors and those summoned by them to buttress their future evidence.

An inspection of the record shows beyond any peradventure of doubt that the testimony used in the last trial showing what took place during Ashcraft's examination might well have had the same practical effect on the jury the written unsigned confession might have had, had it been introduced. For the circumstances leading up to it were narrated in detail both with reference to Ware and Ashcraft. Even the doctor who examined Ware reported not only on Ware's physical condition but also testified in the same breath about his examination of Ashcraft.

Respondent claims that this testimony did not harm Ashcraft and that Ashcraft's supposed statement that he knew who killed his wife was exculpatory. In fact, in the context of this case, that statement was the strongest possible evidence against Ashcraft, who was charged with having been an accessory before the fact. For ten days following his wife's death, Ashcraft had purported to help the officers in their efforts to solve the crime, and for the first twenty-eight hours of his jail interrogation he had not only stoutly maintained his own innocence whenever it was questioned, but had also denied any knowledge whatever as to the identity of the murderer. To admit knowledge of the murder and of who committed it after these protestations by him would for most people be the equivalent of a confession of guilty participation in advance of the crime. Wilful concealment of material facts has always been considered as evidence of guilt. And statements denying guilt followed by a confession of knowledge of who the guilty person was may carry the strongest implications of a guilty knowledge. Cf. *Bram* v. *United States*, 168 U. S. 532, 562. This is particularly true where a husband admits that he has, against the strongest pressures, deliberately concealed the identity of his wife's murderer for ten days.

We see no relevant distinction between introduction of this statement and the unsigned alleged confession, except the possibility that the admission of this long-concealed knowledge was perhaps a more effective confession of guilt than the written unsigned alleged confession would have been. All the reasons given for reversal of the judgment against Ashcraft in the first case, which we need not repeat, apply with equal force here.

The state has asked that if Ashcraft's case is reversed we follow the same course as to Ware that we did in the first case, and vacate the judgment against him. For this reason, as well as the reasons given in our former opinion, we do not pass on the Constitutional question raised by Ware concerning his alleged confession, but vacate the judgment of the Supreme Court of Tennessee affirming Ware's conviction.

We need not now decide other questions that have been argued except one contention mentioned below.[1]

The judgment against petitioner Ashcraft is reversed and that against petitioner Ware is vacated. Both cases are remanded to the State Supreme Court for further proceedings not inconsistent with this opinion.

It is so ordered.

Mr. Justice FRANKFURTER joins in this opinion on the basis of the decision in *Ashcraft* v. *Tennessee*, 322 U. S. 143.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

[1] The petitioner Ashcraft contends that in the oral argument before this Court, when the first conviction was being challenged, the state's attorney admitted that the confession was the only evidence against Ashcraft, and since we mentioned this fact in our opinion, our mandate and the state Supreme's Court's mandate, which adopted our mandate, in effect forbade a new trial of petitioner. We do not think our mandate lends itself to such an interpretation. As to the State Supreme Court's mandate, that Court has construed it by affirming petitioners' second convictions. The state Court's construction of its own mandate is final.